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Aboriginal Self-Government in Aotearoa/New Zealand: A View Through The Canadian Lens

by

Stacey Anne Shortall ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

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ABORIGINAL SELF-GOVERNMENT IN AOTEAROA/NEW ZEALAND: A VIEW THROUGH THE CANADIAN LENS.

University of Alberta

Faculty of Graduate Studies and Research

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **Aboriginal Self-Government in Aotearoa/New Zealand: A View Through The Canadian Lens** submitted by Stacey Anne Shortall in partial fulfillment of the requirements for the degree of Master of Laws.

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Doctor M. Asch

Date: April 24 1996.

Dedicated to my parents, Margaret and Perry Shortall, who not only gave me life, but who have supported me in every desire to truly live.

ABSTRACT

This thesis argues that the right to aboriginal self-government exists in both Canadian and Aotearoa/New Zealand jurisprudence. Common law aboriginal rights provide the legal basis for self-government in Canada. Viewed through the lens of Canadian jurisprudence, similar self-governing rights exist under the Treaty of Waitangi in Aotearoa/New Zealand.

Part One of this thesis explores the nature of claims to aboriginal self-government. In looking to the Canadian experience, it provides an understanding of what is meant by the right to aboriginal self-government. It establishes the legal status of this right and considers the recognition of indigenous governance.

Part Two focuses on the realisation of aboriginal self-government in Aotearoa/New Zealand. Legal status for this right is established under article two of the Maori version of the Treaty of Waitangi. Constitutional entrenchment of this treaty is proposed as a means of realising aboriginal self-government and honouring promises made to Maori people.

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In many ways writing this thesis has involved a significant journey. A journey far beyond travelling from the islands of Aotearoa/New Zealand to the prairies of Canada. Instead, a journey from a state of relative ignorance to some understanding of indigenous law in the land of the long white cloud. There are a number of people I would like to thank for their support throughout this journey.

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1. INTRODUCTION

Many hundreds of years before colonisation, organised aboriginal societies existed on Turtle Island and Aotearoa. In the same lands that were to become Canada and New Zealand, indigenous communities governed themselves. Since colonisation, these governments have become marginalised and/or replaced by culturally alien systems. Aboriginal self-government has been denied.

The historic existence of indigenous government forms the basis of aboriginal claims to autonomy in contemporary times. These claims have become commonplace in Canada and Aotearoa/New Zealand. As Maori continue to assert their right to govern themselves, inter-racial tension grows in the 'land of the long white cloud'. Recognition of the Maori right to self-govern would acknowledge that Maori never relinquished self-governing powers. This acknowledgement, in itself, would counter the historical injustice of denying Maori their peoplehood. Self-government is inherent to being peoples in a true sense.

In proposing a legal basis for the realisation of Maori self-governance, this thesis argues that the right to aboriginal self-government exists in both Canadian and Aotearoa/New Zealand jurisprudence. Common law aboriginal rights provide the legal basis for self-government in Canada. Viewed through the lens of Canadian jurisprudence, similar rights to aboriginal self-government exist under the Treaty of Waitangi in Aotearoa/New Zealand.

This thesis is divided into two parts, each containing three chapters. Part One provides a legal framework in which claims to aboriginal self-government can be understood. Chapters discussing the nature and legal status of this right culminate in consideration of the recognition of self-governance. Part One concentrates on the Canadian experience relating to indigenous claims to self-government. Recent judicial decisions in Canada and federal policy initiatives, render the Canadian experience relevant to realisation of the right to aboriginal self-government in Aotearoa/New Zealand.[1] Much can be learned from Canada in this area.

Part Two of the thesis focuses on the realisation of aboriginal self-government in Aotearoa/New Zealand. Discussion is centred on the status of self-government as a treaty right under the Treaty of Waitangi. This Treaty is central to all Maori claims. It is argued that the guarantee of *te tino rangatiratanga* under article two of the Maori version provides a legal foundation for the right to aboriginal self-government. Constitutional entrenchment of the Treaty of Waitangi as supreme law in Aotearoa/New Zealand is recommended as one means of recognising this right.

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[1] See comments of Cooke P. in *Te Runanga o Muriwhenua Inc.* v. *Attorney-General*, [1990] 2 N.Z.L.R. 641 at 655 in the context of applying principles from Canadian caselaw to Aotearoa/New Zealand:

> in interpreting New Zealand parliamentary and common law it must be right for New Zealand courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples in North America.

It is interesting to take note of the circumstances in which the term 'self-government' is used, as opposed to 'government'. One seldom hears self-government applied to Canadian and Aotearoa/New Zealand non-aboriginal governing systems. It is simply assumed that these governments govern themselves.[2] That a distinction is made in the indigenous context reflects a double standard. There is valid argument that the same assumption be made for both non-aboriginal **and** aboriginal governments. Nevertheless, for the sake of convenience and conformity with common usage, this thesis will utilise the term 'aboriginal self-government'.

Throughout this thesis 'aboriginal', 'indigenous', 'native', 'First Nations' and 'Maori' will be used interchangeably to refer to descendants of the original inhabitants of Canada and Aotearoa/New Zealand. The term 'indigenous' is commonly used to denote those people who assert they are the earliest known inhabitants of certain lands.[3] It has been argued that the word 'aboriginal' adds to 'indigenous' by denoting a specifically claimed political, cultural, economic, and legal relationship between an indigenous people and a colonising state.[4] In this broad sense, an aboriginal people is formed when indigenous people are colonised. Nevertheless this thesis will accord with common usage and use these words interchangeably.

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[2] See F. Cassidy & R.L. Bish, *Indian Government: Its Meaning in Practice* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at xix.

The use of the term 'self-government' rather than 'self-determination' to refer to the aspirations of indigenous peoples to have governing control over their own destiny is deliberate. Self-determination connotes political separation, independence and statehood.[5] This thesis focuses on the re-assertion of aboriginal autonomy along a continuum over which the degree of self-determination will vary.[6] Scope is therefore provided for claims to self-government both within and outside existing state structures.

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[3] See G.F.A. Guntram, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Westport: Greenwood Press, 1992) at 6.

[4] *Ibid.* at 7.

[5] P. Macklem, "First Nations Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 387.

[6] This continuum is discussed in chapter two.

PART ONE:

UNDERSTANDING ABORIGINAL SELF-GOVERNMENT

2. THE NATURE OF ABORIGINAL SELF-GOVERNMENT

Claims to aboriginal self-government have come to dominate much discussion of indigenous issues in Canada. Likewise in Aotearoa/New Zealand, demands for Maori autonomy have been the subject of considerable recent debate. Nevertheless, in both countries there appears to be confusion as to what is meant by aboriginal self-governing claims. The purpose of this chapter is to clarify the nature of these claims and provide some definition of what is meant by self-government in the indigenous context.

A) GOVERNMENT AND COMMUNITY

Understanding the relationship between government and community is essential to apprehending the nature of aboriginal self-government. By placing this form of governance within the context of community, the nature of, and rationale for, self-government becomes obvious.

Scientists and philosophers have long asserted that human beings are unique entities - individuals. Individuality, however, is not so distinctive as to preclude humans having certain attributes in common with eachother. These common attributes have given rise to extensive social relationships. From the time of birth, individuals interact as members of groups bonded by a sense of commonality.

Communities evolve as a result of these interactions. Attributes held in common by a community include kinship, religion, territory, ethnicity, sexuality, economics, and culture.[1] These features are not static. As they change, individual identities and relationships are altered, reinterpreted or lost.[2] Gold Coast Africans become black Americans.[3] First Nations people, it is alleged, become Canadians. Maori are perceived to be New Zealanders. Yet what consistently remains despite such changes, is the need for these peoples to identify with a meaningful group - the desire to belong to a community.[4]

While attributes of ethnicity and religion may help create and sustain communities, exposure to a broader experience often threatens them.[5] With the expansion of technological, economic, and political means of exploitation over time, communities throughout the world have become victimised by those outside themselves.[6] Many groups have undergone significant degradation or even destruction, leaving only vast earthworks, ruined cities, or pyramids, to indicate their prior existence.[7] Other communities have suffered disease or conquest destroying that attribute forming their basis.[8]

---

[1] See S. Venne, *Understanding Treaty 6: Indigenous Perspective* (LL.M Student, Faculty of Law, University of Alberta, 1996) [awaiting publication] at 7: "The use of the term community is to designate the people who have a [sic] history, [sic] social, economic and political interests which are common to them".

[2] See J.F. Barnes, M. Carter & M.J. Skidmore, *The World of Politics: A Concise Introduction*, 2d ed. (New York: St. Martin's Press, 1984) at 16 [hereinafter Barnes].

[3] *Ibid.*

[4] See *ibid.* at 17.

[5] *Ibid.* at 18.

[6] W. Berry, *Sex, Economy, Freedom & Community: Eight Essays* (New York: Pantheon Books, 1994) at 121 [hereinafter Berry].

[7] Barnes, *supra* note 2 at 16.

Within many territories, the demand for land and the presumption of cultural superiority have been voiced as thinly veiled pretence for one community to absorb, displace, or destroy another.[9] Victimised communities have been labeled as primitive and backward.[10] It has been accepted that they must endure the imposition of culturally foreign governing systems for their own good. However, in drawing these ethnocentric, and often racist, assumptions, the purpose has invariably been to facilitate objectives of the invader. The community is not asked **whether** it wants to be changed, or **how** it wants to be changed, or **what** it wants to be changed to.[11]

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[8] See *ibid.*

[9] See *Johnson and Graham's Lessee* v. *M'Intosh* (1823), 8 Wheaton 543, 21 U.S. 240, 5 L.Ed. 681 (U.S.S. Ct.) at 571 [hereinafter *M'Intosh* cited to Wheaton]:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.

[10] See comments regarding British impressions of the Maori around 1840 contained in A. Ward, *A Show Of Justice: racial 'amalgamation' in nineteenth century New Zealand* (Toronto: University of Toronto Press, 1974) at 37:

> they were not 'mere wanderers' or herdsmen, but a people among whom the arts of Government have made some progress; who have established by their own customs a division and appropriation of the soil... But though a superior kind of barbarian the Maori was a barbarian nevertheless...

[11] See Berry, *supra* note 6 at 153.

Many countries are composed of aboriginal communities who have undergone enormous changes triggered by forces external to themselves. They have faced invasion, appropriation and expropriation of their lands, resources, and culture. Invariably they have been forced to accept the invader's governing systems, without any consideration of their own pre-existing governments.

Government has been defined as "the act of exercising supreme political power".[12] It involves the "regulation, restraint, supervision, or control which is exercised upon the individual members of an organised jural society by those invested with authority".[13] In many ways government is the means by which community interests are articulated and recognised. Where a state's system of governance reflects, and/or respects, the values of a certain community, that community is ensured a much greater likelihood of survival. Conversely, when subjected to a system of government which fails to reflect that which a community deems important, the communal group becomes dissatisfied and often dysfunctional.

As Wendell Berry has written, "if you are dependent on people who do not know you, [but] who control the value of your necessities, you are not free, and you are not safe".[14] In contemporary politics, numerous aboriginal communities face this peril. With their community's survival in a constant state of dependence on forces external to themselves, the preference for 'self-government' over 'government by others' becomes understandable.

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[12] *Black's Law Dictionary*, 5d ed. (USA: West Publishing Co., 1979) at 625.
[13] *Ibid.*

Self-government can be defined as government by self, over self. In the context of community, this involves the communal group having the ability to govern their own affairs.[15] Broadly speaking, it has been noted that "beyond this level of generality, self-government is not a term that carries with it a shared, determinate meaning".[16]

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[14] Berry, *supra* note 6 at 128.

[15] See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" [1991] 36 McGill Law Journal 382 at 388 [hereinafter Macklem].

[16] *Ibid.*

B) Within the Aboriginal Context

It is axiomatic that in a pre-colonised state, aboriginal self-government existed. From an anthropological perspective, the proposition that all human beings live in society is trite. 'Homo sapiens' have always lived in systems based upon cultural attributes, with culture itself being an inherent "characteristic of a societal group".[17] Furthermore, research has established conclusively that societies are organized in all aspects of social life.[18] In fact societies have been defined as consisting of relationships between people who are regulated by a common body of recognised rights and obligations.[19]

Given the element of organisation inherent in this definition, the idea that a society could exist that is not organised is virtually incomprehensible.[20] As Harris has stated:

> anthropologists agree that every human society has provisions for behaviour and thoughts related to making a living from the environment, raising children, organising the exchanges of goods and labour, living in domestic groups and larger communities, and the creative, expressive, playful, aesthetic, moral, and intellectual aspects of human life.[21]

Thus, all human societies have mechanisms which provide for living in both domestic groups and larger communities. In studying the behaviour of these human groupings,

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[17] M. Harris, *Culture, People, Nature*, 5d ed. (New York: Harper & Row, 1988) at 482 [hereinafter Harris].

[18] C. Bell & M. Asch, *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation* (Faculty of Law & Faculty of Anthropology, University of Alberta, 1995) [awaiting publication] at 43 [hereinafter Bell & Asch].

[19] L. Mair, *An Introduction to Social Anthropology*, 2d ed. (Oxford: Clarendon Press, 1972) at 10 [hereinafter Mair].

[20] Bell & Asch, *supra* note 18 at 43.

[21] Harris, *supra* note 17 at 113.

anthropologists have concluded that a universal attribute of all societies is the existence of a political process.[22]

Political processes have been described as the means by which societies are established, given order through certain structures, and provided with direction.[23] It is often argued that the systems which evolve from such processes support the rights and obligations that any society must have if it is to be a society at all.[24] The way in which societal communities are governed is one of the most important of these systems.

Given that one of the universal attributes of living in societies is the existence of political processes,[25] that an integral aspect of any political process is a system of government, and that aboriginal people have always lived in societies, it is obvious that aboriginal governments have always existed. In fact the historic presence of this self-governance is well documented.[26] As in any other society, aboriginal people performed essential political functions. They regulated their own societal behavior and patterns of community life. They made collective decisions and dealt with issues of justice. The politics and governments of aboriginal peoples were (like the politics and governments of non-aboriginal peoples), embedded in their social, economic and cultural structure.[27]

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[22] See Bell & Asch, *supra* note 18 at 44.
[23] Barnes, *supra* note 2 at 5.
[24] Mair, *supra* note 19 at 112.
[25] See Bell & Asch, *supra* note 18 at 44.
[26] D. Knoll, "Inherent, Delegated or Contingent Forms of Aboriginal Government" (Address to the Canadian Bar Association, April 28 & 29 1989) at 3.

Despite this history, ever since first contact with Europeans, aboriginal peoples have faced denial of the right to govern themselves. Structures of authority imposed by colonising governments have neither corresponded with their traditional means of governance, or reflected their cultural values. Aboriginal political autonomy has been replaced by European systems dedicated to assimilation, and resulting in cultural destruction. Those political practices that have survived invariably face non-recognition in public government. Even where communities have retained their culturally distinct processes and institutions, the profound impact of the colonisers on the political systems of the colonised, cannot be denied.

It is interesting to consider why a colonising people would believe they had sufficient mandate to systematically impose their form of government on other communities. Such understanding is informed by an appreciation of historic European beliefs as to the nature of aboriginal peoples. The early political theorists such as Locke and Rousseau adopted the romantic 'noble savage' view, whereby indigenous peoples were held to possess the "sovereignty of the natural man".[28] Meanwhile, the Hobbesian perspective embraced a darker conception.[29] Indigenous peoples were depicted as that version of natural man which must be placed under the guidance of a higher civilization, as "man in his natural state is dangerous".[30] From the outset, this perspective regarded aboriginal peoples as inferior to those deemed members of the 'higher civilisation'. Colonisation was thereby legitimated as a means of providing the required guidance to inferior peoples.

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[27] *Ibid.*

Robert Williams has argued that "the history of the American Indian in Western legal thought reveals that a will to empire proceeds most effectively under a rule of law".[31] One sub-text of this rule, applicable in the context of colonisation, is the doctrine of discovery.[32] This medievally grounded discourse vested in colonising governments superior rights of sovereignty over indigenous peoples and their territories.[33] In Canada, suppression of native religious practices and traditional forms of government, separation of children from their homes and forced assimilation programmes, are but a few examples of the practical extensions of this racist discourse - that at its core regards indigenous peoples as culturally, politically, and morally inferior.[34]

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[28] See A. Pratt, "Aboriginal Self-Government and Fiduciary Duty: Squaring the Circle or Completing the Circle" (Address to the Canadian Bar Association, March 27 & 28 1992) at 11.

[29] *Ibid.*

[30] *Ibid.*

[31] R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 325.

[32] Otherwise known as the doctrine of *terra nullius*. The doctrine of discovery, as set out in *M'Intosh, supra* note 9, appears to have been embraced by the Canadian judiciary in *Sparrow* v. *The Queen*, [1990] S.C.R. 1075 at 1081, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, affirming (1986), 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (R. v. Sparrow) (B.C.C.A.).

[33] *Ibid.*

In contemporary times such overt discrimination is rarely displayed. Yet consider the statement of Chief Justice McEachern in the 1991 Supreme Court of British Columbia *Delgamuukw* v. *R. In Right of B.C. And A.G. Canada* decision.[35] He stated that in their pre-contact condition the lives of the Gitksan and Wetsu'wet'en were "nasty, brutish and short", quoting what is certainly the best-known phrase from Hobbes' "Leviathan".[36] The implication of this statement is that indigenous people awaited the arrival of 'civilization' to lift them from their dismal condition. Such beliefs have formed the basis for destruction of aboriginal governments throughout the world. Until repudiated as eurocentric and racist, beliefs of this kind will continue to be serious impediments to the realisation of aboriginal self-government.

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[34] See *ibid.* at 326.

[35] *Delgamuukw* v. *R. In Right of B.C. And A.G. Canada*, [1991] 5 C.N.L.R. 1, 79 D.L.R. (4th) 185 (B.C.S.C.). Note that this decision has now been reversed: [1993] 5 C.N.L.R. 1, 104 D.L.R. 470 (B.C.C.A.).

[36] See P. Mallea, *Aboriginal Law: Apartheid In Canada* (Manitoba: Bearpaw Publishing, 1994) at 195: Specific reference was made to this comment in the United Nations document 'Discrimination Against Indigenous Peoples':

> 132. A more recent (1990) decision, this time of the Supreme Court of British Columbia, Canada, clearly shows that deeply-rooted Western ethnocentric criteria are still widely shared in present-day judiciary reasoning vis-à-vis the indigenous way of life. In his Reasons for Judgement, the Honourable Chief Justice Allan McEachern stated: "The plaintiffs' [Gitksan and Wet'sutwet'en] ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was [sic] not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes [sic] that aboriginal title in the territory was, at best, 'nasty, brutish and short'".

In the face of these beliefs, Canadian First Nations have continued to assert the right to govern themselves. For more than three hundred years the Haudenosaunee (Iroquois Confederacy) have maintained that their Treaty relationship with the British Crown entitles them to continue to govern their own Nations free from Canadian governmental interference.[37] In British Columbia the Nisga'a, Gitksan, and other First Nations have continuously asserted that their right of self-government has never been surrendered or taken away. The Mi'kmaq, Innu, Cree, Dene, and many other Canadian aboriginal people make similar claims.[38]

Meanwhile in Aotearoa/New Zealand, Maori have continually demanded the return of tribal lands and recognition of political autonomy. In both countries such assertions have taken many forms: overt protest, refusals to cooperate, continuance of traditional patterns, and other projections of political authority and cultural distinctiveness.[39]

As one historian has commented, aboriginal people are not seeking to be 'granted' self-government, but to win recognition that viable aboriginal governments existed long before the arrival of Europeans.[40] They are seeking to re-gain the ability to make significant choices concerning their political, cultural, economic and social affairs. In this way, they are demanding recognition of their inherent right to govern themselves.[41]

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[37] K. McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7 Western Legal History 113 at 117.

[38] *Ibid.*

[39] See F. Cassidy & R.L. Bish, *Indian Government: Its Meaning in Practice* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 11.

In pursuing this recognition, aboriginal litigants in the Canadian and Aotearoa/New Zealand legal systems face a stringent burden of proof. In Canada, Professors Catherine Bell and Michael Asch have argued that the courts have presumed that prior to the assertion of British sovereignty, aboriginal people may have lived in groups that were not societies; that these groups may not have been organised; and that they may not have had institutions respecting ownership and jurisdiction.[42] Where litigants fail to establish a factual basis to counter these presumptions, they are deemed as failing to have established the premise upon which continued recognition of certain rights within the Canadian legal system can be founded.[43] Thus, they often have to search back through written records and oral traditions more than one hundred years old in an attempt to provide evidence which demonstrates the existence and operation of 'tell tale' governmental institutions.[44]

Because of the nature of indigenous culture, such evidence will very often take the form of oral testimony. This can add to the difficulty of satisfying the required burden of proof. Take for example the recent judgment of Justice Muldoon in *Sawridge Band* v. *Canada*.[45] Although this case did not involve a self-government claim as such,[46] in considering the oral evidence presented, Muldoon J. stated that "ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics".[47] Given the implications of this statement as to the legitimacy, reliability, and accuracy of oral evidence, meeting the required burden of proof can become very difficult indeed for aboriginal litigants.

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[40] O.P. Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart Inc., 1992) at 407.
[41] See *ibid.* at 408.
[42] Bell & Asch, *supra* note 18 at 51.
[43] *Ibid.*

Bell and Asch emphasise that a stringent burden of proof might be reasonable if such facts could truly be in doubt.[48] However, given contemporary anthropological knowledge as to the nature of human social groups, this can **never** be the case. By virtue of being human, aboriginal people, at the time of the assertion of British sovereignty, must have lived in societies that were organised and had governing institutions.[49] Denial of this fact is tantamount to denying that aboriginal people are human beings. Consequently Bell and Asch recommend that the legal system adopt a contemporary understanding regarding the nature of society.[50]

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[44] *Ibid.*

[45] *Sawridge Band* v. *Canada*, [1995] F.C.J. No. 1013, Judgment: July 6, 1995 [hereinafter *Sawridge Band*].

[46] It is also acknowledged that the writer is in no position to evaluate the credibility of any evidence presented at trial.

[47] *Sawridge Band*, *supra* note 45 at 82.

[48] See Bell & Asch, *supra* note 18 at 51.

[49] See *ibid.*

[50] See *ibid* at 53.

Accepting this recommendation would involve a reversal in the burden of proof. Litigants would have to **disprove** the existence of societal organisation, and the institutions which stem from this organisation. As noted by Bell and Asch, this reversal in onus would allow courts to focus their attention on pertinent legal issues. Current time spent on cultural as opposed to legal analysis involves not only considerable financial cost to aboriginal litigants, but is also a significant waste of judicial time and expertise.[51] Nevertheless, the current reality of the Canadian and Aotearoa/New Zealand legal systems is that aboriginal litigants must discharge a heavy burden in establishing the historic existence of self-governance.

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[51] See *ibid* at 52.

C) DEFINING ABORIGINAL SELF-GOVERNMENT

In the international arena there is a tendency to equate self-government with self-determination. This is particularly problematic in the indigenous context. Self-determination involves the ability of a peoples to choose their own destiny without external compulsion.[52] Self-government is but one aspect of self-determination.[53] In a 1991 *United Nations Meeting of Experts Report*, self-government was described as an integral "part" of self-determination.[54] Likewise in the *Draft Universal Declaration of the Rights of Indigenous Peoples*, self-government is noted as one "specific form" of exercise of the right to self-determination.[55]

The relationship between these two concepts is best understood by placing self-government along a continuum over which the extent of self-determination can vary. At one extreme, self-government is premised on relative independence:[56] a unit that governs itself in all respects, including its relations with the outside world. At this point on the continuum, aboriginal self-government could mean international status, and for many indigenous groups this would entail, at least potentially, secession from the current state.[57] These types of claims accord with self-government aspirations which seek full self-determination, that is sovereignty.

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[52] F. Cassidy, ed., *Aboriginal Self-Determination* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1991) at 1.
[53] This issue is discussed more extensively in chapter three.
[54] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, E/CN.4/1992/42, Nuuk, Greenland, September 24-28 1991.
[55] United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples* (1995) 34 I.L.M. 541 at article 31.

At the other extreme, aboriginal self-government involves self-steering;[58] a political unit that has jurisdiction over internal matters with external affairs being managed by some larger political system.[59] The existence of internal self-regulation within the parameters of a greater political entity, does considerably less to promote indigenous self-determination.[60] In fact at this latter end of the continuum, it is debatable whether the governance being exercised is self-government. Given that the governing system is being defined and limited by something other than the community over which it assumes jurisdiction, it is legitimate to ask whether this is really government by self, over self.

In Canada, it has been argued that an example of this limited type of self-governance can be found in provisions of the *Indian Act.*[61] Although often regarded as a restrictive, "colonial" piece of legislation, various First Nations peoples have used this federal Act to assume certain powers of self-administration or management over their own communities. However, while band members can elect their own council governments,

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[56] K.W. Deutsch, *Politics and Government: How People Decide Their Fate* (Boston: Houghton Mifflin Company, 1970) at 159 [hereinafter Deutsch].
[57] See D.W. Elliott, ed., *Law and Aboriginal Peoples of Canada*, 2d ed. (North York, Ontario: Captus Press Inc., 1994) at 193 [hereinafter Elliott].
[58] Deutsch, *supra* note 55 at 159.
[59] *Ibid.* at 142.
[60] See Elliott, *supra* note 56 at 193.
[61] *Ibid.* at 194. Also *Indian Act*, R.S.C. 1985, c. I-5.

who then have municipal-type legislative and administrative responsibilities, these powers are constantly subject to approval and restriction by the Minister for Indian Affairs and Northern Development. Such a system poses the critical question of whether a certain degree of control is required before a community can be said to have a **meaningful** level of self-government.[62]

Meaningful self-government may vary considerably from community to community. In Canada, self-governing powers enacted pursuant to the *Sechelt Indian Band Self-Government Act, 1986* have faced much criticism from aboriginal groups.[63] It has been argued that the municipal-style government established under this Act is:

> a form of government which has no Indian roots at all... Perpetual vulnerability is the quicksand upon which Indian people will be standing if they choose the municipal model of Indian self-government. A municipal government is not a distinct order of government.[64]

To many aboriginal communities, the Sechelt legislation does little to provide meaningful self-government. However for the Sechelt people themselves, their community now has fully operative status as a federal and provincial municipality. They have legislative powers to negotiate agreements with the federal and provincial governments concerning a variety of governing functions.[65] For Sechelt, they have achieved a form of self-government that is meaningful to their community.

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[62] Refer to criticisms in Appendix One, that the *Indian Act* does little to facilitate actual or meaningful self-government.

[63] *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27.

[64] F. Cassidy & R.L. Bish, eds., *Indian Government: Its Meaning in Practice* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 141.

The powers of self-government sought by aboriginal communities are likely to be highly, or at least somewhat, variable. The degree of autonomy asserted will depend on the needs of each indigenous community. Thus, the futility of seeking one, all-inclusive definition of what the right to self-government involves becomes clear.[66] Just as historical circumstances and present situations vary with every aboriginal group, what is meant when a self-governing claim is made also varies. Nevertheless, any difficulties faced in achieving a universal definition of this right should not be over-stated.

Claims to self-government involve assertions of governmental control.[67] Governmental control implicates the matters that all governments undertake, regardless of ethnicity, including law-making, administration, policy-setting and the provision of services. Self-government in an aboriginal setting is no more, and no less, susceptible of definition than government in the non-aboriginal arena. If indigenous self-government requires definition, as opposed to specific expression, then so to does non-aboriginal self-government.

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[65] See discussion in Appendix One.
[66] See Elliott, *supra* note 56 at 193.
[67] For a more detailed discussion of the types of governmental control implicated by claims to aboriginal self-government, refer to chapter four.

What is clear is that definitions represent positions taken by parties who are competing to achieve a variety of goals.[68] These definitions are merely of theoretical importance. They are tools of debate which are of little significance once agreement is reached. Upon specific recognition of the right to aboriginal self-government in Canada and Aotearoa/New Zealand, the implications of this term will be of much greater significance than any generic meaning assigned to it.

This reality was identified in the 1995 policy announcement of the Canadian Federal Government concerning aboriginal self-government. According to the announcement, the Government had developed an approach to implementation that focused on reaching practical and workable agreements on how self-government would be exercised, rather than trying to define it in abstract terms.[69] Because of the vastly different circumstances of aboriginal people throughout Canada, it was acknowledged that implementation of the inherent right could not be uniform or result in a "one-size-fits-all" form of self-government.[70] Instead:

> recognition of the inherent right is based on the view that the aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[71]

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[68] See G.F.A. Guntram, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Westport: Greenwood Press, 1992) at 2.

[69] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Federal Policy Guide, 1995) at 1.

[70] *Ibid.* at 4.

[71] *Ibid.* at 3.

Defining aboriginal self-government has been the source of much controversy and misunderstanding wherever it has been attempted. This confusion is unnecessary. Self-government has been established as government by self, over self. In the indigenous context, this involves aboriginal communities re-asserting the ability to govern themselves at various points along a continuum of self-government. Searching for a more precise definition will not be required until the right is recognised and negotiations for realisation begin.[72]

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[72] See chapter four.

D) THE RATIONALE FOR RECOGNISING ABORIGINAL SELF-GOVERNMENT

Having discussed aboriginal self-government in the context of community, it hardly seems necessary to outline further rationales for recognition of this right. If the preservation of indigenous communities is important to Canadian and Aotearoa/New Zealand society, self-government should be recognised as a means of ensuring aboriginal groups continued survival.[73]

Current struggles faced by many indigenous peoples throughout Canada and Aotearoa/New Zealand are readily apparent. In both countries, these people figure disproportionately in statistics relating to under education, unemployment and imprisonment.[74] While it would be naive to assume that the recognition of self-government would by itself change many of these statistics,[75] it is plain that current governmental systems are failing aboriginal peoples.

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[73] It could be argued that the importance of preserving aboriginal communities is reflected in sections 25 and 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[74] See R. McLeod, "White Guilt" *North and South* (April 1995): 'Some Facts About Maori' (Taken from government department statistics, census and media reports): 46 percent of prison inmates are Maori; 23 percent of Maori are unemployed, compared with 8 percent of non-Maori; In the 1991 census, 60 percent of Maori over 15 years of age had no educational qualifications, compared with 42 percent of the population as a whole.

In the Canadian context, see Macklem, *supra* note 15 at 386:

> Native people constitute 10% of the population of federal prisons, yet they account for approximately 3% of the Canadian population... According to the 1981 census, the official unemployment rate among natives is two and a half times the national rate... In 1981, only 19% of the native out-of-school population had attained some form of post-secondary education, compared to 36% of the Canadian population as a whole.

[75] *Ibid.* at 453: "The relationship between law and the socio-economic conditions of native people is far too complex to be reduced to a simple relation of cause and effect".

Recognition of self-government is integral to the preservation of community life. Given the universal desire of people to belong to communities, communities hold sway over individuals who identify with them. Where communities are sustained and able to provide positive environments for their members, aspects of dysfunction may be successfully mitigated. At a time when central governments find themselves lost for solutions to disproportionate indigenous unemployment and criminality, recognition of aboriginal self-government warrants consideration.

The resolution of aboriginal claims to self-government would allow communities to move beyond the grievance mode to the development stage. Attention could become focussed on improving community members' lives, instead of lobbying central government for recognition of pre-existing self-governance. Achieving reconciliation on the autonomy issue may even provide a basis for settling land and resource claims.

Whatever rationale for the recognition of aboriginal self-government is accepted, the simple reality is that since colonisation indigenous peoples in Canada and Aotearoa/New Zealand have been denied their right to self-government. Years later all these people seek is justice.[76] The right to self-government has never been given up by aboriginal communities in either country. From the time of colonisation, indigenous groups have continually re-asserted their right to govern themselves. Past state responses to these assertions have repeatedly denied to aboriginal peoples the rights they believed would be protected in the post-colonial period. To recognise aboriginal self-government would be in the interests of justice.

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[76] M. Boldt & J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 353.

3. THE LEGAL STATUS OF ABORIGINAL SELF-GOVERNMENT

The purpose of this chapter is to determine the current legal status of aboriginal self-government at both domestic and international law.

A) AT DOMESTIC LAW

In the Canadian and Aotearoa/New Zealand domestic legal systems, all rules are sourced in either common law or statute. Without common law or legislative recognition, any right derived from a treaty, international law, or even a concept of "natural law" is incapable of enforcement.[1]

1. COMMON LAW

Many legal and political discussions regarding aboriginal issues focus on 'rights'. The right to self-government, the right to title to land and even the right to equality have been asserted as aboriginal and treaty rights.[2] In this sub-chapter, the right to self-government will be examined in both of these common law spheres.

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[1] P. G. McHugh, "The role of law in Maori claims" (1990) N.Z.L.J. 16 at 16.

[2] See R.F. Devlin, ed., *First Nations Issues* (Toronto: Emond Montgomery Publications Limited, 1991) at 54: As Mary Ellen Turpel has noted, this is not particularly surprising given that since the 16th century, much legal and theological literature has concentrated "on the 'rights' of aboriginal peoples, or, perhaps more accurately, on what was right for them".

1.1 ABORIGINAL RIGHTS

Colonial law in the 18th century had legal rules governing matters such as the constitutional status of colonies, and the relative powers of the Imperial Parliament and local assemblies.[3] This colonial law also contained rules regarding the status of native peoples, and the position of their lands, customary laws, and political institutions. These rules formed a body of unwritten law known collectively as the doctrine of aboriginal rights.[4]

In the 1993 *Delgamuukw* v. *R. In Right Of B.C. And A.G. Canada* decision, Lambert J.A. of the British Columbia Court of Appeal described the legal principle providing "for the continuation of indigenous practices, customs and traditions, following British occupation, colonisation and settlement, as the common law Doctrine of Continuity".[5] Professor Slattery has elaborated on the doctrine in these terms:

> This consideration provides for the theoretical basis for the survival of native customary law in Canada, a phenomenon long recognised (but not always well understood) in our courts. When the Crown gained sovereignty over [North] American territory, colonial law dictated that the local customs of the native peoples would presumptively continue

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[3] See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 737 [hereinafter Slattery].

[4] *Ibid.*

[5] *Delgamuukw* v. *R. In Right of B.C. And A.G. Canada*, [1993] 5 C.N.L.R. 1, 104 D.L.R. 470 (B.C.C.A.) reversing [1991] 5 C.N.L.R. 1, 79 D.L.R. (4Th) 185 (B.C.S.C.) at 641 [hereinafter *Delgamuukw* cited to the D.L.R]. It is important to note that this decision has been the subject of much concern in Canada: See P. Mallea, *Aboriginal Law: Apartheid In Canada* (Manitoba: Bearpaw Publishing, 1994) at 195:

> It is worth looking more closely at the trial court decision to see how, even today, a justice system can reject out of hand substantial evidence testifying to the existence of an ordered, civilised society, and prefer instead some pre-conceived notion of naked and violent savages. This court was prepared to accept nothing but the version of law and evidence which British common law had bequeathed, and refused to look for appropriate solutions in areas where Eurocentric approaches were unlikely to work.

> in force and be recognisable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty.[6]

In this way, the doctrine of continuity posits that aboriginal rights are part of the common law of the new colonies, including Canada and Aotearoa/New Zealand.

a) DEFINING ABORIGINAL RIGHTS

From an aboriginal perspective it has been suggested that the definition of aboriginal rights is informed by the concept of civilisation.[7] Civilisation can be seen as the accumulation of traditions and culture of a community of people. It involves the community's ability to express itself through dance, music, art, law, religion, and government.[8] Aboriginal rights guarantee to aboriginal communities the legal ability to develop these pursuits - the right to develop their own civilisation.[9]

In the Canadian context, Michael Asch has argued that at their core aboriginal rights involve having the ability to maintain ways of life that are distinct from the non-aboriginal population:

> These ways of life are not to be interpreted as ethnic in the sense of a Canadian mosaic, but rather as a composite of autonomous systems that integrates languages, economies, social organisations, political organisations, religions and other values into a total culture... The right to preserve and develop such autonomous systems in Canada is perceived to derive, in part, from the manifest failure of the current programs designed to develop viable lifeways for the majority of the aboriginal population. However, at the core, it arises from a vision of Canada as a colonial manifestation and from the

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[6] *Delgamuukw, supra* note 5 at 642.

[7] M. Boldt & J.A. Long, eds., *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 33 [hereinafter Boldt & Long].

[8] See *ibid.*

[9] *Ibid.*

> perception of aboriginal peoples as "colonised" nations that, like those indigenous populations on other continents, have an inherent right to assert their self-determination and control over their own affairs.[10]

That aboriginal people are the original inhabitants of Canada and Aotearoa/New Zealand is central to the concept of aboriginal rights.[11] These rights inure to aboriginal peoples "by virtue of their occupation upon certain lands from time immemorial".[12] In demanding realisation of a broad range of economic, social, cultural, and political rights, aboriginal peoples are essentially making specific claims for recognition of this prior presence.[13]

In *Delgamuukw* , the phrase "an integral part of their distinctive culture" was adopted to describe the "practice, custom or tradition that is sufficiently significant and fundamental to the culture and social organisation of a particular group of aboriginal people as to command recognition as an aboriginal right".[14] Adopting this definition in the context of the doctrine of continuity, it was further held that:

> All aboriginal rights have their origin in aboriginal customs, traditions and practices which were nurtured and protected by the aboriginal society and formed an integral part of their distinctive culture. On the assertion of British sovereignty... the protection of the common law was extended to the aboriginal rights of the Gitksan and Wet'suwet'en peoples and those rights were absorbed into the common law and became recognised and protected as part of the body of the common law and as common law aboriginal rights.[15]

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[10] M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Ontario: Methuen Publications, 1984) at 37.

[11] See B. W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) at 48 [hereinafter Morse].

[12] T. Issac, "The Storm over Aboriginal Self-Government: Section 35 of the Constitution Act 1982 and the Redefinition of the Inherent Right of Aboriginal Self-Government" [1992] 2 C.N.L.R. 6 at 8.

[13] See Boldt & Long, *supra* note 7 at 140.

[14] *Delgamuukw*, *supra* note 5 at 517.

[15] *Ibid.* at 780.

The *Delgamuukw* test recognises that aboriginal rights are integral to a distinctive culture. The protection of these rights provides a legal basis for aboriginal communities to maintain their distinct ways of life and develop their civilisation.

Determining which practices, customs or traditions are integral to aboriginal culture is often controversial. Anthropologists would describe aboriginal rights as having a "multivalent" quality, or many different layers of definition depending on the speaker, the context of use, and the time at which evoked.[16] Nevertheless, it is clear that an integral part of indigenous culture was, and is, the existence of governance.

In Canada, the aboriginal right to self-government has been recognised by the Federal Government as "inherent".[17] Inherent aboriginal rights have been described as those which "inhere in the very meaning of aboriginality".[18] Elsewhere it has been suggested that inherent rights derive from sources outside of the state.[19] It may well be that these two descriptions are not mutually exclusive, in that the aboriginality of First Nations predates the state, and is therefore derived from sources outside the state.[20]

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[16] Boldt & Long, *supra* note 7 at 141.

[17] See Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Federal Policy Guide, 1995) at 1.

[18] *Ibid* at 9.

[19] See M.Asch & P. Macklem, "Comment on Sparrow" (1991) 29 A.L.R. 498.

[20] Note comments of Professor Litman regarding the Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Rights and the Negotiation of Aboriginal Self-Government* (Ottawa: Federal Policy Guide, 1995) at 5: The Policy Guide lists those self-governing powers the federal government would see as subjects for

Although the Canadian judiciary has readily accepted traditional activities like hunting, fishing, and trapping as inhering in aboriginality, and, therefore, included within the doctrine of aboriginal rights, there has been little opinion on the scope of claims to non-resource rights (such as that to self-government). The first decision in Canada to really analyse issues of aboriginal jurisdiction, and government, was *Delgamuukw* in 1993. This case involved a claim of ownership to, and self-government over, an area of land in British Columbia. Although the British Columbia Court of Appeal found that the plaintiffs had no jurisdiction to enact laws that would conflict with provincial and federal laws, and thereby dismissed their specific claim to self-government, this decision discussed aboriginal rights extensively. Macfarlane J.A., for the majority, stated that:

> The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty... Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society... The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors including the nature, kind and purpose of the use or occupancy of the land by the aboriginal community in question, and the extent to which such use or occupancy was exclusive or non-exclusive.[21]

Aboriginal rights attach to land. They have their origin in the historic occupation of land by aboriginal peoples.[22] An integral aspect of this occupation involved the exercise of governance. As noted by Chief Justice Marshall of the United States Supreme Court in *Worcester* v. *State of Georgia*:

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negotiation, thereby making the right to self-government contingent on negotiation. This is misconceived, as it undermines the recognition that the right to self-government is inherent. Inherent rights, by their very definition, cannot be contingent.

> America, separated by Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, **having institutions of their own, and governing themselves by their own laws** [emphasis added].[23]

Upon colonisation, the doctrine of continuity ensured that aboriginal rights would form part of Canadian and Aotearoa/New Zealand common law. Different approaches adopted by judiciaries over the years have determined the nature of those aboriginal rights recognised at common law.

b) APPROACHES TO ABORIGINAL RIGHTS

For decades, when considering aboriginal rights, Canadian jurists followed the late nineteenth century decision of *St. Catherine's Milling and Lumber Co.* v. *The Queen*.[24] In that case the Court regarded aboriginal rights as deriving exclusively from government recognition in legislation, executive instruments with legislative effect, or constitutional enactments.[25] This approach is referred to as the "**recognition-based**" approach to aboriginal rights.

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[21] *Delgamuukw*, *supra* note 5 at 496-497.

[22] See comments by Wallace J.A. in *ibid.* at 591.

[23] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 542-543 [hereinafter *Worcester*]. Marshall C.J also noted at 559 that:

> The settled doctrine of the law of nations is, that a weaker power does not surrender its independence - **its right to self-government** - by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state [emphasis added].

[24] *St. Catherines Milling and Lumber Co.* v. *The Queen* (1888), 14 A.C. 46, 4 Cart. B.N.A. 107, 2 C.N.L.C. 541 [hereinafter *St. Catherines*].

[25] D.W. Elliott, ed., *Law and Aboriginal Peoples of Canada*, 2d ed. (North York, Ontario: Captus Press Inc., 1994) at 27 [hereinafter Elliott]. Note also that there has never been any legislative statement which can be regarded as an explicit recognition of the inherent right to self-government.

Use of the recognition-based approach in Canada has been aptly criticised for making aboriginal rights subject to the self-interest of the dominant colonising group. It has been argued that the courts have subordinated fundamental principles of justice and human rights to the collective self-interest of the state and thereby legitimated the dominant group's use of political and legislative power to deprive indigenous people of their aboriginal right to self-government.[26]

It was not until 1973 when *Calder* v. *Attorney General of British Columbia*[27] was decided that the Canadian courts rejected the recognition-based approach. In that case, the Supreme Court held that aboriginal rights could arise at common law by virtue of prior and continued occupancy, and use, of land. This notion was re-affirmed in the 1982 *Guerin et al.* v. *R.* decision, where the Supreme Court clarified somewhat the status of aboriginal rights at common law.[28] A variety of important issues were addressed in the case including the existence and nature of aboriginal title, the character of surrenders of native land, and the fiduciary obligation of the Crown towards indigenous people. The Court treated each issue as one of unwritten or common law, existing independently of statute or executive order.[29] This approach has subsequently attracted the label of "**occupancy-based**".[30]

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[26] Boldt & Long, *supra* note 7 at 140.

[27] *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145.

[28] *Guerin et al.* v. *R*, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120.

In recent years a third approach to characterising the source of aboriginal rights has evolved. Described as "**community-based**", this approach contends that aboriginal rights are sourced in common law recognition of **all** important and distinctive aboriginal **community traditions** that pre-date European sovereignty.[31] This approach has long been advocated by proponents of the aboriginal right to self-government.[32] It is argued that not only did rights to land survive settlement or colonisation, but so too did the internal laws, customs and other practices of pre-European aboriginal communities - including those that animate self-government.[33]

In the 1995 *R.* v. *Pamajewon and Jones*[34] decision, the Ontario Court of Appeal held that it is clear from cases such as *Sparrow* v. *The Queen*[35] that the common law recognises aboriginal rights which are integral to indigenous practices. This finding accords with the test for aboriginal rights set out in *Delgamuukw*. In *R.* v. *Vanderpeet*, it was noted that "aboriginal rights are determined as matters of fact, from the evidence of the traditional practices, customs and use of tribal lands which reflected the traditional way of life of the Aboriginal community at the time of sovereignty".[36]

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[29] Slattery, *supra* note 3 at 103.

[30] See Elliott, *supra* note 25 at 27.

[31] See *ibid.*

[32] *Ibid.*

[33] In fact, there were signs of this community-based approach as early as 1867 in *Connolly* v. *Woolrich and Johnson*, (1867) 17 R.J.R.Q. 75, 1 C.N.L.C. 70. This case has been seen by many as the possible basis for adopting a broader approach to aboriginal rights, including recognition of common law aboriginal self-government rights. Nevertheless, there are various factors serving to diminish this decision's influence. The Court of Appeal gave little support to any general proposition that powers of self-government survive changes of sovereignty. Furthermore Badgely J.A., with whom the other majority judges agreed, suggested that where there was a clear change of sovereignty, as in conquest, it was only private rights and property that would survive.

[34] *R.* v. *Pamajewon and Jones*, [1995] 2 C.N.L.R. 188 [hereinafter *Pamajewon*].

[35] *Sparrow* v. *The Queen*, [1990] S.C.R. 1075, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, affirming (1986), 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (R. v. Sparrow) (B.C.C.A.) [hereinafter *Sparrow* cited to the S.C.R].

Given the integrality of governance to all aboriginal communities, self-government would appear to fall within current understanding of the nature and content of aboriginal rights. In considering the Canadian jurisprudence it is clear that the aboriginal right to self-government attaches to land. Where indigenous lands are still intact, it will be much easier to establish an aboriginal right to self-government over that territory. Where territories have been wrongfully taken,[37] it is arguable that the right to self-government still exists over that land. Once restitution of the land has occurred, self-government could be asserted within the territory as an aboriginal right.

Further implied support for the aboriginal right of self-government attaching to land can be found in the *Mabo* v. *Queensland* decision.[38] The High Court held that when the Crown acquired sovereignty over Australian territory, pre-existing rights and interests

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[36] *R.* v. *Vanderpeet*, [1993] 4 C.N.L.R. 221, affirming [1991] 3 C.N.L.R. 151 (B.C. Prov. Ct) & 161 (S.C.) at 244 [hereinafter *Vanderpeet* cited to the C.N.L.R.].

[37] For example, where indigenous lands were wrongfully expropriated by statute or other state government action.

[38] *Mabo* v. *Queensland* (1992), 75 A.L.R. 1., (1992) 175 C.L.R 1, [1992] 5 C.N.L.R.

in land survived.[39] There was judicial comment that such rights and interests are to be determined according to traditional laws and customs of the holders of title to that land.[40] It can be convincingly argued that self-government is one of these 'traditional laws and customs'. Given the emphasis on such rights being attached to territory, this decision supports the Canadian view that the aboriginal right to self-government is tied to a land-base.

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[39] T. A. Gray, "The Myths of Mabo" in The Law Book Company Limited, *Essays on the Mabo Decision* (North Ryde, NSW: The Law Book Company Limited, 1993) 148 at 150.

[40] See C. Wickliffe, *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* (Report prepared for New Zealand Parliamentary Commissioner for the Environment, 1994) at 14.

1.2 TREATY RIGHTS

Treaty rights are those rights which arise by virtue of a treaty. In the 1990 *Sioui* decision, the Canadian Supreme Court stated that "what characterises a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity".[41] McLean J. in his concurring opinion in *Worcester*, noted how aboriginal self-government was actually a pre-condition of any treaty-making process:

> [a treaty] is a contract formed between two nations or communities, having the right of self-government. Is it essential that each party shall possess the same attributes of sovereignty, to give force to the Treaty? This will not be pretended: for, on this ground, very few valid treaties could be formed. **The only requisite is that each of the contracting parties shall possess the right of self-government**, and the power to perform the stipulation of the treaties [emphasis added].[42]

The fact that recognised treaties were entered in both Canada and Aotearoa/New Zealand suggests that aboriginal treaty parties possessed self-government. The issue then becomes whether those treaties provide any basis for the on-going protection of this pre-existing means of governance. Where this can be established, aboriginal self-government will be held as a treaty right at common law.

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[41] *Sioui* v. *A.G. Que.*, [1990] 3 C.N.L.R. 127, 70 D.L.R. (4th) 427 (S.C.C.), affirming [1987] 4 C.N.L.R. 118, [1987] R.J.Q. 1722, 8 Q.A.C. 189 (Que. C.A.) at 441 [hereinafter *Sioui* cited to the C.N.L.R.].

[42] *Worcester*, *supra* note 23 at 580.

a) IDENTIFYING TREATY RIGHTS

In Aotearoa/New Zealand treaty rights flow from the Treaty of Waitangi, which was signed in 1840 between Maori tribes and the British Crown.[43] Meanwhile in Canada, with the exception of portions of British Columbia, Quebec and Nunavut, an extensive treaty-making programme was entered into.[44] The written versions of these treaties typically involved cession of land by indigenous peoples in exchange for reserve areas, and hunting, fishing, trapping, gathering, and other rights.

In recent years, new Canadian treaties have been entered into as part of comprehensive land claim agreements negotiated between the federal government and various aboriginal communities. Many of these modern treaties contain provisions which explicitly recognise self-government to be a treaty right. For example the *Vuntut Gwitchin First Nation Self-Government Agreement* was the first of a number of self-governing agreements to be signed as part of the greater *Yukon Land Claims Agreement*.[45] Sections 13 to 18 of this *Self-Government Agreement* outline specific governing powers which the Vuntut Gwitchin First Nation can now exercise as express treaty rights.[46]

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[43] For detailed discussion of the Treaty of Waitangi, refer to chapter six.

[44] See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) McGill L.J. 383 at 425 [hereinafter Macklem]: "Since 1700, close to 500 treaties have been negotiated between representatives of the Crown and native people in Canada".

[45] Elliott, *supra* note 25 at 207.

[46] *Ibid.*

From an on-going treaty-making process, Canadian treaty jurisprudence has become characterised by relatively well-defined principles regarding the legal status of treaties, and the substantive rights flowing from them.[47] To date, most judicial consideration of treaty provisions in Canada have addressed hunting and fishing clauses.[48] Caselaw relating to the interpretation of other provisions, not to mention self-government itself, is almost non-existent.[49] Likewise in Aotearoa/New Zealand, many treaty rights have still to be brought before the courts.

Establishing that self-government is a treaty right is particularly challenging because of the absence in the historic Canadian treaties and the Treaty of Waitangi of express guarantees of indigenous governance.[50] It has been noted that considerable judicial resistance to the recognition of self-government as a treaty right is based in principles of treaty interpretation.[51]

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[47] See Macklem, *supra* note 44 at 442.

[48] See R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing Inc., 1995) at III 11 [hereinafter Reiter].

[49] See *ibid* at II 18.

[50] As will be discussed in chapter six, it is arguable that the Maori language version of the Treaty of Waitangi **implicitly** recognises the treaty right to self-government in article two.

[51] Macklem, *supra* note 44 at 427.

6) TREATY INTERPRETATION

In Canada, judicial interpretation of treaties has traditionally placed much reliance on Anglo-Canadian understandings of land surrenders.[52] The aboriginal perspective has been basically ignored. Treaties are assumed to involve a surrender of land which is exchanged for certain specified benefits, such as hunting and fishing. The surrender vests in the Crown the right to exclude almost all non-proprietary rights associated with the ceded land.[53] These assumptions inform treaty jurisprudence to the detriment of alternative aboriginal understandings which view the right to self-government as surviving the treaty process.[54]

Recent Canadian decisions offer some hope that the Canadian judiciary is adopting a fresh approach to treaty interpretation. There is little controversy in suggesting that the original intent of the parties, the 'spirit and intent' of the treaties, must be the central focus of judicial consideration.[55] This requires an interpretation of treaty rights that goes beyond the literal wording of the documents, and takes into account the purpose of the treaties and their lasting significance as understood by **both** signatories. The facts surrounding the signing of the treaty, and the subsequent conduct of parties, is useful in determining intent, and has been so recognised.[56] In some cases, oral evidence is pertinent to establishing the effect of treaties:

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[52] *Ibid.* at 443.
[53] *Ibid.*
[54] See *ibid.*
[55] Reiter, *supra* note 48 at II 18.

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is important to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.[57]

Given the vital role that self-government plays in community survival, it is highly unlikely that any aboriginal treaty partner would have understood, or intended to give up the right to self-government. It is far more likely that indigenous people would have intended to **preserve** this governance as treaty right within the treaty-making process. Brian Slattery has suggested that, in entering into treaties with aboriginal peoples, the Crown would have realised this:

> a review of the Crown's historical relations with aboriginal peoples supports the conclusion that the Crown, in offering its protection to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws, unless the terms of treaties ruled this out or legislation was enacted to the contrary.[58]

Unless treaty terms ruled out self-government, or legislation was enacted to the contrary, the understanding would have been for indigenous governance to continue.

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[56] See *Sioui, supra* note 41 at 155.

[57] *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, 62 C.C.C (2d) 227 at 232, [1981] 3 C.N.L.R. 114 at 120 (Ont. C.A.) [hereinafter *Taylor and Williams* cited to the C.N.L.R.].

[58] Slattery, *supra* note 3 at 101.

1.3 UNDERSTANDING THE RELATIONSHIP BETWEEN ABORIGINAL RIGHTS AND TREATY RIGHTS

Self-government can exist as both an aboriginal and treaty right. Establishing common law status for self-governance in one of these spheres will not preclude its existence in the other, and vice versa.

In Aotearoa/New Zealand, one explanation of the relationship between aboriginal rights and treaty rights, stems from the so-called 'declaratory' model. This model contends that the Treaty of Waitangi [the Treaty] was intended to do no more than 'declare' the existing common law doctrine of aboriginal rights as at 1840.[59] This approach was considered in the Waitangi Tribunal's *Muriwhenua Fishing Report*, where it was stated that there is obviously "some concurrence between the doctrine [of aboriginal rights] and the Treaty principle of protecting Maori interests".[60]

Commentators, while noting concurrence between the principles of the Treaty[61] and those emanating from the doctrine of aboriginal rights, have argued that the two are distinct. Richard Boast has observed that the case for the Treaty being "declaratory" is quite weak when specific provisions of the Maori version are considered.[62] It would be difficult to establish that Maori concepts of *rangatiratanga* and *taonga* were supposed to be 'declaratory' of the English common law doctrine of aboriginal rights.[63] The Tribunal has thus adopted the view that treaty rights and aboriginal rights exist side by side.[64]

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[59] R.P Boast, "Treaty rights or aboriginal rights?" (1990) N.Z.L.J. 32 at 34 [hereinafter Boast].

[60] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wellington: Department of Justice, 1988) at 22. In terms of the legal status of reports issued by this Tribunal, the Aotearoa/New Zealand Court of Appeal has reaffirmed that it is not bound by any Waitangi Tribunal reports. However, various judges have stated that these reports should be given considerable weight. Jurisprudence developed by the Tribunal has been used increasingly by the courts in defining aspects of the Treaty of Waitangi: see M. Chen & G. Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Auckland: Oxford University Press, 1993) at 332.

[61] For fuller discussion of the "principles" of the Treaty of Waitangi, refer to chapter six.

In Canada, the Supreme Court has stated that treaty rights are independent of aboriginal rights even if they deal with the same subject matter.[65] Treaty rights and aboriginal rights can be said to co-exist. The approaches adopted in Aotearoa/New Zealand and Canada are similar in dealing with the relationship between aboriginal and treaty rights. Because these rights exist side by side or co-exist, a degree of independence is apparent. This is significant in cases where it is alleged that there has been an extinguishment of a certain right. Extinguishment of a treaty right will not preclude it having legal status as an aboriginal right. Alternately, extinguishment as an aboriginal right will not automatically mean extinguishment as a treaty right. Because treaty rights may be more resistant to extinguishment,[66] the independent legal significance of aboriginal and treaty rights may be of considerable importance.

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[62] Boast, *supra* note 59 at 34.

[63] These concepts will be explained in chapter six.

[64] Boast, *supra* note 59 at 34.

[65] *Simon* v. *The Queen* (1958), 5 C.N.L.C. 617 (N.B.C.A.).

[66] See *ibid.* and *Sioui, supra* note 41.

1.4 EXTINGUISHMENT

One of the greatest impediments to establishing a common law right to aboriginal self-government is the doctrine of extinguishment. Extinguishment occurs when government action terminates aboriginal or treaty rights.[67] Abridgment (or regulation) is government action that diminishes these rights, but does not result in actual extinguishment.[68] Regulation may or may not be lawful.[69]

As Cory J. stated in *R.* v. *Horseman* "the onus of proving either express or implicit extinguishment lies upon the Crown".[70] If litigants are able to establish the existence of self-government as an aboriginal or treaty right, the Crown faces the burden of proving any alleged extinguishment.

a) EXTINGUISHMENT BY TREATY

Extinguishment of aboriginal rights by treaty has been a constant source of dispute in many countries where indigenous communities have claimed rights. At the core of these disputes are conflicting interpretations of treaty documents. This is particularly evident in Aotearoa/New Zealand, where English and Maori versions of the Treaty of

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[67] Morse, *supra* note 11 at 111.
[68] See *ibid.*
[69] *Sparrow*, *supra* note 35 at 1098: If the justification test in *Sparrow* can be satisfied then the regulation is lawful. If the test cannot be satisfied, the regulation is unlawful.
[70] *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 930.

Waitangi translate to very different meanings.[71] Differences in meanings can have very significant implications to the issue of extinguishment.[72]

In Canada, treaties which provided for the ceding of land have been interpreted by the judiciary as extinguishing aboriginal title to that land.[73] Whether this extinguishment extends to all other rights emanating from or associated with the land, such as self-government, has not yet been addressed, though it is clear that specific provisions contained within a treaty can extinguish particular aboriginal rights.[74]

Oral discussions surrounding treaty negotiations form a relevant consideration in treaty interpretation,[75] and therefore may be very pertinent to the issue of extinguishment. The Waitangi Tribunal in Aotearoa/New Zealand has emphasised the importance of oral discussions. It has opined that the "Treaty is an agreement made between two parties, one of which had an oral culture, the other a literate culture. To understand the meaning of the Treaty, we have to consider what was said and agreed to as well as what was written down".[76]

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[71] This issue will be discussed in detail in chapter six.

[72] See Morse, *supra* note 11 at 112.

[73] See *R.* v. *Paul*, [1982] 4 C.N.L.R. 132 and *St. Catherines Milling and Lumber Co., supra* note 22.

[74] For an example in the fishing rights context: See *R.* v. *Howard*, [1992] 2 C.N.L.R. 122 at 124 (Ont. C.A.) affirmed [1994] 3 C.N.L.R. 146 (S.C.C.).

[75] See *Taylor and Williams, supra* note 57.

[76] A.L. Mikaere & D.V. Williams, "Maori Issues" [1992] N.Z.R.L.R. 152 at 163. Given that this Waitangi Tribunal finding accords with Canadian law, its persuasive value in the Aotearoa/New Zealand courts must be strengthened.

Whether oral representations have an impact on the issue of extinguishment of the right to aboriginal self-government is unclear. It has been noted in Canada that there is unanimity amongst elders that oral representations made by Treaty Commissioners during negotiations included guarantees that full powers of self-government would be retained by the aboriginal signatories.[77] Such opinions have yet to receive judicial support.[78]

6) EXTINGUISHMENT BY STATUTE

In Aotearoa/New Zealand the issue of extinguishment by statute was addressed in the *Te Weehi* v. *Regional Fisheries Officer* decision.[79] Williamson J adopted the Canadian test from *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* where it was held that a statute had to express a "clear and plain intention to extinguish that right" before extinguishment could occur.[80] This decision has been reinforced by *R.* v. *Sparrow* which sets out the same test for extinguishment.[81] In that case, the Court held that provisions allowing "Indians" to fish for food within certain guidelines "in no way shows a clear intention to extinguish". The implication can be drawn that laws of general application will not be sufficient to extinguish an aboriginal or treaty right.[82]

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[77] See Morse, *supra* note 11 at 398.

[78] However, some of the oral representations made by Commissioners are consistent, if not evidence, of such guarantees: See M. Litman & C. Bell, "Race, Indigenous Rights, and Egalitarianism" (Faculty of Law, University of Alberta, 1996) [unpublished] at 14-15.

[79] *Te Weehi* v. *Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 690 (High Court).

[80] *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*, (1979) 107 D.L.R. (3D) 513.

[81] *Sparrow*, *supra* note 35 at 1099.

While the application of this 'clear and plain' test appears relatively simple when the legislation in question expressly purports to extinguish aboriginal or treaty rights,[83] complexities arise in the absence of such express intent. In this regard, the majority of the Court in *Delgamuukw* held that extinguishment could be accomplished by **necessary implication** if the interpretation of a statute permits no other meaning or result: "Applying the clear and plain test to extinguishment of aboriginal rights, there can only be extinguishment by necessary implication if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished". [84]

One analysis of the 'necessary implication' test within the context of statutory interpretation has concluded that:

> The question whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the enactment, having regard to the accepted guides to legislative intention.[85]

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[82] See P. Kulchyski, ed., *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 213.

[83] See section 155 of the *Maori Affairs Act*, 1953, Vol. II, No. 94:

> Except so far as may be otherwise expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against her Majesty the Queen or against any Minister of the Crown or any person employed in any department of State acting in the execution of his office.

[84] *Delgamuukw*, *supra* note 5 at 524.

[85] F. Bennion, *Statutory Interpretation*, 2d ed. (London: Butterworths & Co. (Publishers) Ltd, 1992) at 367.

Support for an implication being 'necessary' will therefore be gained if finding the implication is 'proper or legitimate'. As has been noted:

> The proper and legitimate test is unworkable. It begs the question. The implication is proper and legitimate only if the legislation which it is alleged has had the extinguishing effect clearly and plainly is intended to have this effect. It clearly and plainly has this effect if it is proper and legitimate to imply this intention. Without more specifics, the necessary implication test amounts to no more than a carte blanche to judicial subjectivity.[86]

At present *Delgamuukw* provides the most useful statement regarding the parameters of necessary implication test. According to the British Columbia Court of Appeal, there can only be extinguishment by statute if no other possible interpretation can be taken from the legislation. As in any interpretative exercise, determining that the only possible interpretation is that aboriginal rights were intended to be extinguished is highly subjective.

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[86] Comment made by Professor Litman, 18 April 1996.

1.5 CURRENT STATUS OF SELF-GOVERNMENT AS AN ABORIGINAL RIGHT AT COMMON LAW

In Aotearoa/New Zealand, the courts have yet to consider the issue of self-government as an aboriginal right. Common law status for this right has, however, begun to be addressed in recent Canadian decisions.

Justice Macfarlane, in the majority judgment of the British Columbia Court of Appeal in *Delgamuukw* described rights of self-government as legislative powers.[87] He held that a continuing aboriginal legislative power was inconsistent with sections 91 and 92 of the *Constitution Act, 1867* which had exhaustively distributed legislative power in Canada.[88] The claim to self-governing jurisdiction was therefore dismissed.

Macfarlane J.A. made a number of obiter statements distinguishing self-governing jurisdiction from the lesser right to self-regulation. He noted that no declaration of the court "is required to permit internal self-regulation in accordance with aboriginal traditions **if the people affected are in agreement**".[89] If there was no conflict between certain traditions and provincial or federal laws, he saw no reason why aboriginal people could not continue to self-regulate.[90]

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[87] *Delgamuukw, supra* note 5 at 518.
[88] *Ibid.* at 519.
[89] *Ibid.* at 518.

In the dissenting *Delgamuukw* opinion, Justice Lambert considered the relationship between rights to self-government and self-regulation. He regarded:

> the claim to self-government and self-regulation, as it was ultimately advanced in the appeal, as a claim by the Gitksan and Wet'suwet'en peoples, first, to manage and control the exercise of their rights in relation to the use of land and resources encompassed within their collective aboriginal title and within their other collective aboriginal rights, and second, to regulate the internal relationships within their own society and culture in accordance with their own customs, traditions and practices. I do not regard the claim as it was ultimately advanced as a claim to sovereignty over the territory...[91]

Justice Lambert saw no relevance in the arguments relating to the *Constitution Act, 1867*.[92] He concluded that the plaintiffs claim did not implicate plenary or overriding law-making power.[93] As such, recognition of the right to self-government and self-regulation was not inconsistent with the historic distribution of authority under the *Constitution Act, 1867*. Self-government and self-regulation could still exist in partial form. Lambert J.A declared:

> The aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, at the time of sovereignty, in 1846, except for:
> (a) any of those rights which related to sovereignty and so were inconsistent with British sovereignty over the area;
> (b) any of those rights which would at that time have been repugnant to natural justice, equity, and good conscience, and have not since then so modified themselves as to overcome that repugnancy; and
> (c) any of those rights which were contrary to the part of the common law that was not from local circumstances inapplicable to the territory and to the Gitksan and Wet'suwet'en peoples and their institutions

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[90] *Ibid.* at 517-518. Note comments by Professor Litman, (18 April 1996) that this conception of the indigenous right to self-regulate is demeaning. It amounts to nothing more than recognition that aboriginal peoples can operate as non-charitable unincorporated associations of individuals.

[91] *Ibid.* at 727.

[92] *Ibid.*

[93] *Ibid.*

> were recognised by, incorporated into, and protected by, the common law after 1846; that they have not been extinguished by any comprehensive (blanket) extinguishment; and, accordingly, subject only to specific extinguishment of specific rights of self-government and self-regulation, they exist in a modern form suitable to the culture and society of the Gitksan and Wet'suwet'en peoples as their culture and society now exist..."[94]

The decision of Justice Lambert raises a number of issues. In concluding that arguments relating to the *Constitution Act, 1867* were irrelevant, he brings into question the basis of the majority decision, though not the conclusion itself, that full and plenary governing powers of the indigenous communities had been extinguished. Macfarlane J.A. makes it clear that the division of governmental powers between Canada and the provinces in 1871 "left no room for a third order of government".[95] Meanwhile Justice Lambert concluded that the assertion and application of British sovereignty would have extinguished some, **but not all**, rights to self-government.

The conclusion that an aboriginal right could exist in a partially extinguished form appears contrary to findings of the Supreme Court of Canada in *Sparrow*.[96] In the *Sparrow* decision it was held that the "word "existing" makes it clear that the rights to which s.35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect".[97] An existing aboriginal right is not to be read as incorporating the specific manner in which it was regulated before 1982.[98] In other words, if an aboriginal right existed in 1982, it continues to exist legally in its unregulated form. The right could be regulated, but regulation would be regarded as prima facie infringement, and in order to be lawful would have to withstand the rigour of the justification tests set out in *Sparrow*. It the aboriginal right did not exist, if it was extinguished, it could not be revived by the *Constitution Act, 1982*.[99] Accordingly, the reasoning of the Supreme Court of Canada could be regarded as precluding Justice Lambert's declaration that the aboriginal right of the Gitskan and Wet'suwet'en to self-government has been **partially** extinguished.

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[94] *Ibid.* at 739-740.

[95] *Ibid.* at 520.

[96] In raising this argument, the writer wishes to acknowledge the suggestions of Professor Litman.

[97] *Sparrow, supra* note 35 at 169.

On the other hand it could be argued that Justice Lambert's views can be given effect to under the theory of lawful regulation. Under this view the plenary powers associated with indigenous self-governance may be subject to enduring and lawful regulation, but they have not been extinguished. Sparrow should not be read so as to preclude enduring and lawful regulation effectively implicating partial extinguishment.[100] If the regulation can be justified, it has the same effect as partially extinguishing an aboriginal right.

The majority and minority decisions in *Delgamuukw* differ over whether an aboriginal right to 'self-regulation' or 'self-government' still exists. Nonetheless, they both reveal that the contemporary version of aboriginal self-government is diminished significantly from the full and plenary form which characterised it historically. The decision of the British Columbia Court of Appeal in *Casimel* v. *Insurance Corp. of British Columbia* noted that the conclusion which should be drawn from *Delgamuukw* is that none of the Judges:

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[98] *Ibid.* at 170.
[99] *Ibid.*

> decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society.[101]

While the scope of the right to self-government has been significantly reduced from its relatively unbridled historic form, a significant remnant still has status as an aboriginal right at common law. Exactly what this remnant involves has yet to be judicially decided.

Considering self-government within the context of aboriginal rights, it was noted in *Pamajewon and Jones* that "the nature and scope of an aboriginal right is related to the aboriginal tradition or practice from which it arises".[102] This is similar to the statement in *Vanderpeet* that any determination of the scope and nature of an aboriginal right will be made by reference to "specific traditional practices integral to the Native culture pre-sovereignty".[103] Those aspects of self-government able to be recognised in modern times

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[100] As suggested by Professor Litman, 18 April 1996.

[101] *Casimel* v. *Insurance Corp. of British Columbia*, [1994] 2 C.N.L.R. 22 at 33.

[102] *Pamajewon, supra* note 34 at 3.

[103] *Vanderpeet, supra* note 36 at 241.

will not, however, be limited by these traditional practices. Placing historical limitations on aboriginal rights is a reflection of the now discredited *frozen rights theory*. This theory states that rights exist only in the form historically exercised and are not capable of modification or change.[104] The majority decision in *Sparrow* explicitly rejected this approach in the context of section 35 of the *Constitution Act, 1982*.[105]

Given the rejection of the frozen rights theory, Canadian courts have enhanced their ability to recognise self-governing powers which have currency, and are practical and meaningful. Just as functions of non-aboriginal governments have evolved over time, indigenous communities need modern tools of governance, such as taxation, which have not been traditionally exercised. To define and limit the content of aboriginal rights by the manner in which they have historically been exercised is to deny that government is the articulation of ever-changing community interests.[106]

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[104] See L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32:4 Osgoode Hall Law Journal 735 at 774.

[105] *Sparrow, supra* note 35 at 1099.

[106] Refer to discussion in chapter two, regarding government as the means by which community interests are articulated.

1.6 CURRENT STATUS OF ABORIGINAL SELF-GOVERNMENT AS A TREATY RIGHT AT COMMON LAW

None of the historic Canadian treaties, nor the Treaty of Waitangi in Aotearoa/New Zealand, explicitly recognise the right of self-government.[107] Nevertheless, *Sioui* held that existing aboriginal self-government was a pre-condition of entering into treaty.[108] In other words the mere fact of treaty affirms the existence of self-government as an aboriginal right at the date of signature. Without wording to the contrary, it could be argued that the treaty language presupposes continuation of the self-governing status of signing parties.[109] In this way, self-government would become implicitly recognised as a treaty right at common law.

Establishing this argument in any particular case would involve careful analysis of that language used in specific treaty documents. This inevitably adds complexity and variability to arguing self-government as a treaty right. Complexity is also heightened in Aotearoa/New Zealand by the need for statutory incorporation of the Treaty before the rights it guarantees become legally enforceable. This requirement for incorporation into statute derives from the 1941 decision of *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*.[110]

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[107] Note that some of the modern Canadian treaties do expressly provide for self-governing powers: See Appendix One: 'Self-Governing Legislation in Canada via Ordinary Statutes'.

[108] *Sioui, supra* note 41 at 436.

[109] This argument will be discussed extensively within the Aotearoa/New Zealand context in chapter six. In considering clauses of the numbered treaties in Canada where aboriginal peoples agreed to obey "Her Majestys laws", it is still arguable that these signatories never intended a cession of full self-governance: See earlier discussion in this chapter concerning treaty interpretation.

In that case, the Privy Council held that "it is well established that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law".[111] In order for Aotearoa/New Zealand courts to protect treaty rights, it was held that the rights must be incorporated into statute.

This decision is contrary to the *pacta sunt servanda* principle of treaty law. According to this fundamental principle, treaties are legally binding.[112] The guarantee of certain rights in a treaty creates a binding obligation on signatory parties to uphold these rights. The domestic law requirement that there be statutory incorporation of such rights, constitutes a breach of this principle, but does not alter the fact that the rights are unenforceable.

Under current domestic law the statutory incorporation rule remains unchallenged. In recent years some judges appear to be attempting to work around this rule by utilising the Treaty of Waitangi as an interpretative tool for ambiguous legislation.[113] But for the purposes of establishing aboriginal self-government as a treaty right in Aotearoa/New Zealand, such judicial pronouncements are not of real assistance. Until the *Hoani Te Heuheu Tukino* decision is successfully challenged it will remain a huge, but not insurmountable,[114] obstacle to the establishment of indigenous governance as a treaty right.

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[110] *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308 (Privy Council).
[111] *Ibid.* at 309.
[112] See M.W. Janis, *An Introduction to International Law*, 2d ed. (New York: Brown, Little and Co., 1993) at 11.

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[113] In *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R. 641 (CA) at 665, Cooke P. noted "that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty". In *Huakina Development Trust* v. *Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188 at 203, Chilwell J. held that the Treaty of Waitangi is "part of the context in which legislation which impinges upon its principles is to be interpreted, when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material".

[114] Refer to the recommendation in chapter six: constitutional entrenchment of the Treaty of Waitangi would preclude the need to over-turn this decision.

2. LEGISLATION

Having established the legal status of aboriginal self-government at common law, it is also important to consider its legislative treatment. Although in Aotearoa/New Zealand there are no statutes which expressly confer or implement the right to aboriginal self-government, a number of self-governing arrangements have legislative standing in Canada. These enactments have status as ordinary legislation.[1] Furthermore, under the *Constitution Act, 1982* aboriginal self-government in the Canadian context may also hold constitutional status.[2] The purpose of this sub-chapter is to consider the constitutional significance of those self-governing arrangements which exist in Canada and evaluate the advantages of expressing self-government in legislative form.

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[1] There are a number of self-governing legislative arrangements in Canada. These Acts are summarised in Appendix One and include:

- *Indian Act*, R.S.C. 1985, c. I-5.
- *An Act Concerning Northern Villages and the Kativik Regional Government*, S.C. 1978, c. 17.
- *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27.
- *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 24.
- *Yukon First Nations Self-Government Act*, S.C. 1994, c. 34 (and other self-government legislation enacted on behalf of the Vuntut Gwitchin, the Nacho Nyak Dun, the Champagne and Aishihik, and the Teslin Tlingit, in conjunction with the Council for Yukon Indians comprehensive claims: See Minister of Indian Affairs and Northern Development, *Basic Departmental Data 1994* (Ottawa: Information Management Branch, January 1995) at 76).

There are also a number of land claim agreements that have been reached in Canada which include provisions for self-government, but have not resulted in the enactment of legislation. These include:

1. Indian Affairs and Northern Development, *The Western Artic Claim: The Innuvialuit Final Agreement* (Ottawa: Minister of Supply and Services, 1984).
2. Indian Affairs and Northern Development, *Comprehensive Land Claim Agreement between Her Majesty the Queen in Right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council Comprehensive* (Ottawa: Minister of Supply and Services, 1992).
3. Indian Affairs and Northern Development, *Comprehensive Land Claim Agreement between Her Majesty the Queen in Right of Canada and the Dene of Colville Lake, Deline, Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as represented by the Sahtu Tribal Council* (Ottawa: Minister of Supply and Services, 1993).

[2] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act*].

2.1 LEGAL STATUS OF ABORIGINAL SELF-GOVERNMENT WITHIN THE CANADIAN CONSTITUTIONAL FRAMEWORK

Self-governing powers enacted pursuant to ordinary statute face the risk of unilateral amendment by majority vote in Parliament. Constitutionally entrenched forms of self-government avoid this vulnerability, and have the additional advantage of prevailing over any inconsistent legislation. Although in Aotearoa/New Zealand there is no constitutional document through which the right to aboriginal self-government may assume higher legal status,[3] in Canada section 35 of the *Constitution Act, 1982* appears to afford this status.

a) EFFECT OF SECTION 35

Section 35 of the *Constitution Act, 1982* is as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
> (3) For greater certainty in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[4]

In the 1993 *R.* v. *Vanderpeet* decision, Wallace J.A. noted that the purpose of section 35:

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[3] Refer to discussion in chapter six.
[4] *Constitution Act, supra* note 2.

> was to protect, from encroachment by the legislatures and by Parliament, existing Aboriginal rights to engage in those activities which reflect customs and practices integral to the traditional, Aboriginal way of life at the time of sovereignty.[5]

Given the integral nature of self-government to all aboriginal communities, protection of indigenous governance appears to fall within the purpose of section 35. With section 35(3) including self-governing powers acquired by way of land claims agreements as treaty rights, governance provisions within these agreements would also have constitutional standing.

To date, most cases regarding section 35 have involved the extent to which aboriginal and treaty rights to hunt and fish are constitutionally protected against legislative infringement.[6] In *Sparrow* v. *The Queen*, a purposive interpretative approach to the interpretation of section 35 was adopted:

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.[7]

One of the most significant of these words is 'existing'. The Supreme Court of Canada reasoned that the word 'existing' means 'unextinguished' as of April 17 1982.[8] The burden falls on aboriginal claimants to demonstrate the existence of such an unextinguished right.[9] Once established, federal and provincial legislation can limit the manner in which this right is exercised, or even abrogate the right, if the legislation can be 'justified'.[10] Thus, although section 35(1) is substantive in nature, the Court has made it clear that the rights it recognises and affirms are not absolute.[11] There is no textual justification for this qualification of section 35 rights. The qualification is invented, presumably to advance judicial philosophy that all rights, including constitutionally protected rights, need to be balanced against other rights and interests.

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[5] *R.* v. *Vanderpeet*, [1993] 4 C.N.L.R. 221, affirming [1991] 3 C.N.L.R. 151 (B.C. Prov. Ct) & 161 (S.C.) at 239.

[6] K. McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7 Western Legal History 113 at 128.

[7] *Sparrow* v. *The Queen*, [1990] 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, [1990] 3 C.N.L.R. 160 at 179 [hereinafter *Sparrow* cited to the C.N.L.R.].

Tests regarding legislative infringement and justification are set out in *Sparrow*. Formation of these tests was strongly influenced by the Court's view that federal authorities must act in a fiduciary capacity with respect to native peoples.[12] In terms of infringement, the core question involves whether the legislation in question has the effect of interfering with an existing section 35 right. If the statutory limitation is unreasonable and imposes undue hardship on the aboriginal plaintiffs, a prima facie infringement of

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[8] See T. Isaac, "The Storm Over Aboriginal Self-Government: Section 35 Of The *Constitution Act, 1982* And The Redefinition Of The Inherent Right Of Aboriginal Self-Government" [1992] 2 C.N.L.R. at 12 [hereinafter Isaac].

[9] See M. Stevenson, "Constitutional Entrenchment of Aboriginal Self-Government" (Address to the Canadian Bar Association, March 27 & 28 1992] at 6.

[10] See paragraph immediately below.

[11] Isaac, *supra* note 8 at 13.

[12] See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" [1991] 36 McGill L.J. 382 at 447 [hereinafter Macklem]. See also *Sparrow, supra* note 7 at 184: In situations where a valid legislative purpose can be found, the infringement must also be justified in the context of the "special trust relationship and the responsibility of the government vis-à-vis aboriginals".

section 35(1) is established.[13] The Crown's burden in justifying an infringement is significant. It:

> would have to demonstrate a valid legislative objective, such as conservation or the prevention of harm to the general population or aboriginal peoples. Secondly, the[y]... would have to show that "any allocation of priorities after valid conservation measures have been implemented must give top priority" to Indian interests... The Court also indicated that other cases may require determining whether there has been as little infringement as possible in order to effect the desired result; whether fair compensation has been made available in the event of expropriation; and whether there has been adequate consultation with affected native peoples.[14]

The Court in *Sparrow* acknowledged that meeting such a justificatory standard may place a heavy burden on the Crown,[15] but in its view this is appropriate if the rights of aboriginal people are to be "taken seriously".[16] Although the *Sparrow* decision makes it clear that any rights recognised and affirmed by section 35(1) are not absolute, the ability of legislation to infringe these rights is restricted by heavy justificatory standards.

6) IMPLICATIONS FOR AOTEAROA/NEW ZEALAND

Under current law, aboriginal self-government in Aotearoa/New Zealand can only enjoy ordinary legislative status. There is no constitution through which this right can be enshrined with higher law protection. Without constitutional status, legislated aboriginal self-government faces the risk of unilateral Parliamentary amendment. Statutory self-governing powers may also be over-ridden by other inconsistent statutes. There are, nonetheless, a number of advantages in expressing aboriginal self-government in a legislative form in Aotearoa/New Zealand.

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[13] *Sparrow, supra* note 7 at 182.

2.2 ADVANTAGES OF EXPRESSING SELF-GOVERNMENT IN A LEGISLATIVE FORM

Specific legislation can be used to eliminate uncertainty relating to various aspects of self-governing powers. The legal status, jurisdiction and financing of aboriginal self-government can be specified in ordinary statutes. Creating this type of certainty for self-government can have advantages over general constitutional recognition such as that arguably provided by section 35 of the Canadian *Constitution Act, 1982*.

Merely conferring constitutional status on the indigenous right to self-government does no more than establish that the right to aboriginal self-government exists. Without specific legislation providing for implementation of this right, the nature and scope of self-governance remains ambiguous. Complimenting any constitutional recognition with particularised legislation is essential to the successful implementation of aboriginal self-government.

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[14] Macklem, *supra* note 12 at 448.
[15] *Sparrow*, *supra* note 7 at 186.
[16] *Ibid.* at 187.

Even where constitutional recognition does not exist, **any** statute which provides for self-government is advantageous to aboriginal communities. It provides a legal basis for this right which is well understood. As such, statutes provide a solid foundation for the recognition, exercise and enforcement of self-governing powers. The binding nature of statutes on third parties is also significant. Self-government arrangements based on agreements between First Nations and Canadian governments cannot bind third parties. Moreover, unlike legislation, agreements cannot provide third parties with the legal certainty which they may seek in doing business with aboriginal communities. The need to abide by legislation is generally understood by members of society. Rules of common law and international legal obligations are not always so easily comprehended.

The Canadian situation provides evidence of the value of legislating for aboriginal self-government. As noted by Cassidy and Bish:

> Evidence to date indicates that Indian governments can achieve much through engaging in specific, community-bases negotiations that lead to special legislation... To an extent, Indian governments can use such arrangements to clarify their roles in the federal-provincial system. They can obtain formal guarantees concerning funding levels and expectations. They can gain more power over many community services and programs.[17]

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[17] F. Cassidy & R.L. Bish, *Indian Government: Its Meaning In Practice* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 154.

Achieving legislative status for aboriginal self-government is an objective that should be pursued in Aotearoa/New Zealand. Statutory enactments can ensure considerable protection for self-government and provide a legal basis for enforcement of this right.

B) At International Law

No consideration of the current legal status of aboriginal self-government would be complete without discussing the standing of this right at international law. Although detailed discussion is outside the scope of this thesis, an attempt will be made to simply outline the legal basis for aboriginal self-governance in the international sphere.

1. Self-Government And Self-Determination

At international law the status of aboriginal self-government exists in the field of human rights. More specifically, self-government is seen as an integral aspect of the wider human right to self-determination.

The concept of self-determination has been held to involve the right of peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[1] In the 1991 United Nations report regarding *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, it was noted that indigenous peoples have "the right to self-determination, including the right of autonomy, self-government and self-identification".[2]

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[1] F. Cassidy, ed., *Aboriginal Self-Determination* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1991) at 191.

One recommendation arising out of this report was that:

> Indigenous peoples have the right to self-determination as provided for in the International Covenants on Human Rights and public international law and as a consequence of their continued existence as distinct peoples... An integral part of this is the inherent and fundamental right to autonomy and self-government.[3]

Self-government can thus be described as **one aspect** of self-determination. It follows that self-government assumes implicit legal status at international law.

2. THE LEGAL STATUS OF SELF-DETERMINATION

Article 38(1) of the *Statute of the International Court of Justice* is widely acknowledged as the most authoritative statement regarding the sources of international law:

> the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law, recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[4]

In keeping with this Article, the sources of international law have been held to comprise customs, treaties and general principles of law.[5] Judicial decisions and academic writings are often accepted as verification of these sources.[6] The right to self-determination can be found in a number of international law sources.[7]

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[2] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, E/CN.4/1992/42, Nuuk, Greenland, September 24-28 1991.

[3] *Ibid.*

[4] M.N Shaw, *International Law*, 3d ed. (Cambridge: Grotius Publications Limited, 1991) at 59 [hereinafter Shaw]. Also note Article 59 of this Statute that "The decision of the Court has no binding force except between the parties and in respect of that particular case": See I. Brownlie, *Principles of Public International Law*, 4d ed. (Oxford: Clarendon Press, 1990) at 3.

2.1 INDIGENOUS 'MINORITIES' OR INDIGENOUS 'PEOPLES'?

Categorisation of indigenous communities as 'peoples' or members of 'minority' groupings greatly affects the sources of international law available to these communities when seeking an international law basis for the right to self-determination. Unfortunately, much uncertainty pervades this issue.[8]

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[5] See Shaw, *supra* note 4 at 59.

[6] See *ibid.*

[7] A discussion of some of these sources will follow later in this chapter.

[8] See United Nations Commission on Human Rights, *Second Progress Report: Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, UN EASC, 47th Sess., Supp. No. 14, UN Doc. E/CN.4/Sub.2/1995/27 at 11 [hereinafter Second Progress Report]. It should be noted that a definition of indigenous peoples does exist in Article 1 of the 1989 *Convention Concerning Indigenous and Tribal Populations in Independent Countries*: cited as (1989) 28 I.L.M. 1382:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[8]

However, the scope of this definition is qualified in clause three of this Article:

> The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.[8]

At the societal level, 'minorities' can be described as those entities with distinct cultures, languages or religions who may require protection against discrimination from the majority population. In his second progress report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Special Rapporteur referred to attempts by two experts to formulate a definition of 'minorities':

> The authors agree on the notion of these groups of people as numerical minorities; on their non-dominant position in the social fabric; on their shared ethnic, religious or linguistic traits; on the sense of community that moves them; and on the collective will to survive in accordance with their traditions and style of life.[9]

Alternatively, 'peoples' have been described as "distinct cultural, historical and territorial groups entitled, by their very collective nature, to make collective decisions for themselves".[10]

Considerable debate surrounds the classification of indigenous communities as 'peoples' or 'minorities'. Communities, themselves, strongly assert their right to self-identify as 'peoples'.[11] E. I. Daes, Chairperson of the United Nations Working Group on Indigenous Populations (Daes), has argued that:

> indigenous groups are unquestionably 'peoples' in every political, social, cultural and ethnological meaning of this term. They have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic,

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[9] Second Progress Report, *supra* note 8 at 11.

[10] R.L. Barsh, "Indigenous peoples and the right to self-determination in international law" in B. Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company Limited, 1988) 68 at 69 [hereinafter Barsh].

[11] J.J. Corntassel & T. Hopkins Primeau, "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"" (1995) 17 Human Rights Quarterly 343 at 348 [hereinafter Corntassel & Primeau].

> religious and spiritual relationship with the territories in which they have lived.[12]

Many states are adamant that the rights of these groups are merely those of a minority. In Canada and Aotearoa/New Zealand the argument is often made that indigenous communities are now minorities in terms of state populations. As such, their rights are the same as other minority groups. In response, aboriginal communities have argued that the population of a group is irrelevant. What is important is the cultural, historical, and legal distinctiveness of indigenous groups, and the nature of their territorial claims.

Despite such assertions, the rights of indigenous groups have invariably been deemed those of minorities at international law. Even where these groups make up the majority of a state population, their rights are still seen as attaching to a minority.[13] Confining the rights of these communities to those of minorities has effectively limited their right to self-determination and self-government.

In his second progress report, the Special Rapporteur noted that minority rights tend to focus on individuals, "not to the group of people as such and considered in its entirety".[14] The framing of rights in an individual, as opposed to a collective capacity can be seen in a number of international law sources dealing with minority rights. Take for example Article Two of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*:

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[12] Grand Council Of The Crees (Of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec* (Nemaska, Quebec: Grand Council Of The Crees, 1995) at 35 [hereinafter Grand Council Of The Crees].

[13] Even in Greenland where the Inuit make up approximately 90 percent of the population and Guatemala where Mayan groups account for 60 percent of the total, they have yet to be accepted as 'peoples' at international law: see Corntassel & Primeau, *supra* note 11 at 347.

> 1. **Persons** belonging to national or ethnic, religious and linguistic minorities... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
> 2. **Persons** belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
> 3. **Persons** belonging to minorities... [emphasis added][15]

Placing aboriginal communities in the minority category undermines their ability to achieve meaningful self-governance. Minorities do not have the right to govern all their affairs or determine for themselves their political and legal relationships with other groups.[16] The ability of minorities to achieve self-determination and self-government is not inherent to their status.

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[14] Second Progress Report, *supra* note 8 at 12-13.

[15] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNGA Res. 47/135 (1993), (1993) 32 I.L.M. 912. See also *Council of Europe: Framework Convention for the Protection of National Minorities* (1995) 34 I.L.M. 351.

[16] See Grand Council Of The Crees, *supra* note 12 at 44.

2.2 FURTHER QUALIFICATIONS ON THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION

The right of 'peoples' to self-determination is expressed in a number of international law sources. Article 1 of the *United Nations Charter* clearly states that:

> The purposes of the United Nations are: ...
> 2. To develop friendly relations among nations based on respect for the **principle of equal rights and self-determination of peoples**, and to take measures to strengthen world peace [emphasis added].[17]

In the first Articles of the two international treaties on human rights, namely the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, it is further emphasized that: "**All peoples have the right to self-determination**. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development [emphasis added]".[18] At the regional level, Article 20 (1) of *The African Charter on Human and Peoples' Rights* states that:

> All peoples shall have the right to existence. **They shall have the unquestionable and inalienable right to self-determination**. They

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[17] Article 1(2) of the *Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. More specifically Article 55 states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote..

and Article 56 adds that

> All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.

[18] Article 1(1) of both the *International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966), and the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46.

> shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen [emphasis added].[19]

Although these Articles recognise the right of all 'peoples' to be self-determining, the *Draft Universal Declaration of the Rights of Indigenous Peoples* explores this right as it relates to aboriginal communities.[20] Prepared by the United Nations Working Group on Indigenous Populations, the *Draft Declaration* was adopted by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities on August 26, 1994 and was submitted to the Commission on Human Rights at its fifty-first session in 1995 for further action. Article 4 of the *Declaration* states:

> Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[21]

Meanwhile in Article 31 it is emphasized that:

> **Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government** in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions [emphasis added].[22]

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[19] Article 20(1) of *The African Charter on Human and Peoples' Rights, 1981* contained in I. Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon Press, 1992) at 551.
[20] United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples* (1995) 34 I.L.M. 541.
[21] *Ibid.* at Article 4.
[22] *Ibid.* at Article 31.

This *Draft Declaration* has not been finally approved by the internal United Nations bodies responsible for the *Declaration*. As such, it has yet to assume any binding status at international law. However, the *Draft Declaration* does reflect the growing acknowledgment that aboriginal self-determination and self-government are basic human rights.[23]

Having identified those international documents which provide legal status for self-determination and, implicitly, self-governance, it is important to acknowledge that there is debate regarding the scope of this right. It has been argued that the international law concept of what constitutes a peoples "has been evolved, so that the "self" in question must be determined within the accepted colonial territorial framework".[24] In those rare situations where indigenous communities have been considered 'peoples', United Nations practice has invariably confined the right of self-determination to the decolonising process.[25]

Extension of any right of self-determination to **all** indigenous peoples has been denied for fear that acknowledgment of this right would threaten the territorial integrity of established states.[26] Explicit support was given to the territorial integrity principle in the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*.[27] Under the heading "principle of equal rights and self-determination of peoples", this *Declaration* provided that the right to self-determination could not be exercised so as to:

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[23] See Grand Council Of The Crees, *supra* note 11 at 49: While some might argue that the *Declaration* is only a 'draft', it is already being used "as a source of legitimacy for particular positions in intrastate politics".

[24] Shaw, *supra* note 4 at 161.

[25] See G. Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights" in The Law Book Company Limited, *Essays on the Mabo Decision* (North Ryde, NSW: The Law Book Company Limited, 1993) 103 at 112. The decolonisation process involves colonial powers relinquishing control

> dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.[28]

Prioritization of this right to territorial integrity over indigenous peoples' rights to self-determination effectively protects the "territorial framework of the colonial period in the decolonisation process".[29]

Concern to protect this territorial framework is reflected in decisions of the International Court of Justice. In the 1975 *Advisory Opinion on Western Sahara*, the Court affirmed the right to self-determination in the decolonising context as a general rule

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over administered territories. These territories become independent states in their own right: see discussion later in this chapter concerning the Western Sahara.

[26] *Ibid.*

[27] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), (1970) 9 I.L.M. 1292.

[28] United Nations, *United Nations Action in the Field of Human Rights* (New York: United Nations Publication, 1980) at 25.

[29] Shaw, *supra* note 4 at 161.

of customary international law.[30] Spain was in the process of decolonising the Western Sahara. The United Nations General Assembly had asked the Court for an opinion as to whether the area should be granted independence as a separate state or divided between Morocco and Mauritania.[31] Because this opinion concerned the formation of a new state, not the assertion of self-determination within an existing entity, the Court was amenable to affirming the right to self-determination and recommending independence.

More recently, in the 1995 *East Timor (Portugal* v. *Australia) Judgment*, Judge Mbaye in his dissenting opinion interpreted self-determination in conjunction with "the principle of inviolability of borders".[32] This case concerned proceedings in which Portugal alleged that Australia had failed to observe the status of Portugal as the administering Power of East Timor.[33] Portugal also alleged that Australia had failed to respect the rights of the people of East Timor to self-determination and other related rights.[34] The Court found that Portugal was still the administering power of East Timor and Australia had a duty to respect that position.[35] Judicial comment regarding self-determination was limited to decolonising situations, although it was noted that the principle of self-determination "is one of the essential principles of contemporary international law".[36]

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[30] *Advisory Opinion on Western Sahara*, [1975] I.C.J. Rep. 6 at 32, para. 55; see also 37, para. 72 and 68, para. 162.

[31] M.W. Janis, *An Introduction to International Law*, 2d ed. (London: Little, Brown and Company, 1993) at 139.

[32] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at 266.

[33] *Ibid.* at 92.

[34] *Ibid.*

[35] *Ibid.* at 191.

The effect of this jurisprudence on indigenous claims to self-determination is reflected in recent discourse. Daes has argued that the principle of self-determination as reflected in the *Draft Declaration*, "was used in its *internal character*, that is short of any implications which might encourage the formation of independent states".[37] Even where aboriginal communities are accepted as 'peoples', it appears they possess the right to some form of "internal self-determination" **within** the state.[38] This could involve rights to free and fair elections, or guarantees of participation in government. The need to balance recognition of human rights and protection of territorial integrity has qualified any powers of self-governance enjoying current status at international law.

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[36] *Ibid.* at 265.

[37] Corntassel & Primeau, *supra* note 11 at 362.

[38] This type of approach is seen as a means of balancing competing interests of state entities and indigenous populations: See J.T. Rourke, *Taking Sides: Clashing Views on Controversial Issues in World Politics*, 5d ed. (Connecticut: The Dushkin Publishing Group, Inc.) at 247:

> The sovereignty, territorial integrity and independence of States within the established legal system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead... Our constant duty should be to maintain the integrity of each will finding a balanced design for all.

3. EFFECTIVENESS OF INTERNATIONAL LAW AS AN AGENT FOR THE RIGHT TO ABORIGINAL SELF-GOVERNMENT

Resolving whether aboriginal communities are 'minorities' or 'peoples' appears pivotal to determining whether international law can effectively facilitate self-determination and self-governance of indigenous groups. Given the continuous debate over this issue, the likelihood of resolution is remote. In some ways, a stalemate has been reached. Aboriginal communities refuse to accept classification as minorities because to do so would stall, if not thwart, their desires to be self-determining. State governments refuse to recognise indigenous groups as peoples because they fear that doing so has the potential to threaten state territorial integrity. The concept of **'internal self-determination'** offers some hope for reconciliation. Territorial integrity need not be threatened if peoples exercise this form of self-determination **within** existing states.[39]

While the effectiveness of international law in promoting human rights is debatable, it is important to recognise that the international standing of every modern state is affected by its human rights record. In many ways, human right principles established by the United Nations provide the standards by which the credibility and integrity of states are judged.[40] That aboriginal self-government may be a right at international law, may not impel either Canada or Aotearoa/New Zealand to recognise the right. However, the response of other states to such inaction, internal moral discomfort, and the potential for indigenous peoples to adopt more aggressive means to achieve their aspirations, may generate the good sense and political pressure to recognise self-government. Daes has made the latter point as follows:

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[39] Refer to preceding paragraph.

> It is not realistic to fear indigenous peoples' exercise of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples' rights to self-determination will leave the most marginalised and excluded of all the world's peoples without a legal, **peaceful** weapon to press for genuine democracy in the States in which they live [emphasis added].[41]

Aboriginal self-government does have legal status at international law. While international law cannot ensure that states effectuate this right, it provides leverage to indigenous claims to self-government. This leverage may play a significant role in persuading states to abide by their international law commitments.

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[40] Barsh, *supra* note 10 at 77.

[41] Grand Council Of The Crees, *supra* note 12 at 56.

4. RECOGNITION OF THE RIGHT TO ABORIGINAL SELF-GOVERNMENT

Recognition of the right to aboriginal self-government will involve profound change in the governance of indigenous peoples in Canada and Aotearoa/New Zealand. At the basic level, re-assertion of governing power by aboriginal communities will alter structures of authority within the existing state. Depending on the degree of self-government re-claimed, communities may assume responsibility over a wide range of governing functions.

Following the Nuuk *Meeting of Experts on Indigenous Autonomy and Self-Government*, it was recommended that self-government could involve:

> *inter alia*, jurisdiction over or active and effective participation in decision-making on matters concerning their land, resources, environment, development, justice, education, information, communications, culture, religion, health, housing, social welfare, trade, traditional economic systems, including hunting, fishing, herding, trapping and gathering, and other economic and management activities, as well as the right to guaranteed financial arrangements and, where applicable, to levy taxes for financing these functions.[1]

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[1] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, E/CN.4/1992/42, Nuuk, Greenland, September 24-28 1991.

Meanwhile it has been noted in Canada that there are no matters of governance over which aboriginal governments themselves "do not assert, at least in principle, inherent jurisdiction".[2] In fact, it has been stated that:

> They affirm the rights to govern policing and justice, health, education, child welfare, communication, and all other governmental services, as well as the management of land, natural resources, and the fiscal relations that touch upon the territorial and demographic domains within which they exert authority. In some instances, such as in the cases of the Six Nations, the James Bay Cree, or the Haida, they assert their right to participate and be treated as independent nations in the international arena. Indian governments affirm the authority to be active in every activity of government. They also affirm the authority to govern their members on and off the lands under their jurisdiction, and to govern the activities of nonmembers on Indian land.[3]

Clearly, there is a very broad spectrum of governmental authorities that are envisaged when assertions of aboriginal self-government are made.[4] Both the lack of fixed meaning and the practical difficulties of implementing any particular version of self-government are roadblocks to **recognition** of the right to indigenous governance. How the aspiration for more individual and collective control by natives over their destiny is to be translated into institutional reality must be addressed.[5] Although legal status may provide the basis for claims to aboriginal self-government, political reality will dictate the manner in which these claims are received. Advocating recognition of indigenous governance involves not only establishing a legal basis for the right, but expressing the right in a specific and realistic manner.

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[2] F. Cassidy & R.L. Bish, *Indian Government: Its Meaning in Practice* (co-published: Lantzville, B.C; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 39 [hereinafter Cassidy & Bish].

[3] *Ibid.*

[4] This broad spectrum involves the 'continuum of self-government' which was discussed in chapter two.

[5] P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382 at 389.

The 1995 Canadian Federal Policy Guide regarding aboriginal self-government notes the flexibility and desirability of a community-specific approach:

> Given the vastly different circumstances of Aboriginal peoples throughout Canada, implementation of the inherent right cannot be uniform across the country or result in a "one-size-fits-all" form of self-government. The Government proposes to negotiate self-government arrangements that are tailored to meet the unique needs of Aboriginal groups and are responsive to their particular political, economic, legal, historical, cultural and social circumstances.[6]

In addressing the scope of aboriginal self-government, it is further stated that:

> The Government realizes that Aboriginal governments and institutions will require the jurisdiction or authority to act in a number of areas in order to give practical effect to the inherent right of self-government. Broadly stated, the Government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution.[7]

The Policy Guide goes on to outline the range of matters the federal government perceives as negotiable.[8] The list of areas over which aboriginal communities may re-assert control is broad. That which is not negotiable is limited, but distinct:

> There are a number of subject matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority. These subject matters cannot be characterised as either integral to Aboriginal cultures, or internal to Aboriginal groups. They can be grouped under two headings: (i) powers related to

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[6] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Federal Policy Guide, 1995) at 4-5 [hereinafter Federal Policy Guide].

[7] *Ibid.* at 5.

[8] Refer Appendix Two.

> Canadian sovereignty, defence and external relations; and (ii) other national interest powers.[9]

This statement of policy reflects the political reality which claims to aboriginal self-government in Canada face. Though such limitations can be viewed as restrictive, they can also be understood as liberating, as eliminating burdens that aboriginal governments might otherwise have to discharge. One of the benefits of being part of a federal state, like Canada, is not being responsible for matters of national concern such as defence.

If the federal government is to gain aboriginal support for this policy statement, they must ensure that the indigenous perspective is represented in any interpretation of the policy clauses. To clarify powers which can be negotiated for aboriginal governments without first entering into negotiations with indigenous communities would be unwise.

The particular governmental authorities that are important to aboriginal communities will vary somewhat from community to community.[10] Certain governing powers such as those pertaining to land management and natural resources may most appropriately and effectively be exercised by individual communities. Alternatively, governance over education, and certain aspects of criminal justice and child welfare, may be more effectively dealt with by communities uniting together.[11]

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[9] Federal Policy Guide, *supra* note 6 at 6-7.

[10] See Royal Commission on Aboriginal Peoples, *Exploring The Options: Overview of the Third Round* (Public Hearings) (Ottawa: Minister of Supply and Services, November 1993) at 35-36 [hereinafter Third Round]: It was clear throughout the public hearings that the types of self-governing powers sought, and the nature of institutions through which these powers would be administered, depends entirely on the aboriginal community involved. Many different models were presented by diverse native organisations and councils.

Providing details about the content of aboriginal self-government is not particularly worthwhile in the absence of particular claimants. Details are contingent on the desires of communities and the circumstances, including economic and political, in which they find themselves. The powers of self-government need to be negotiated, but it is improper to require specifics about how these powers will be exercised. For "how indigenous people choose to exercise their rights is a right in itself. It cannot be pre-determined by the state in which...[they]...find themselves [insert added]".[12]

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[11] See discussion of this issue in the Aotearoa/New Zealand context in chapter seven.
[12] Third Round, *supra* note 10 at 30.

A) THE ISSUE OF JURISDICTION

Canadian jurisprudence has established that the aboriginal right to self-government attaches to land. Legislative arrangements providing for aboriginal self-government in Canada provide for jurisdiction on a territorial-basis. Even at international law, the concern of states to protect their territorial integrity in light of indigenous claims to self-determination implies that any right of self-government is tied to a land base.

Land based jurisdiction is fundamental to aboriginal self-government in Canada where many First Nations have governing authority over their reserve areas. Large scale urbanisation of indigenous people in Canada has also given rise to demands for non-territorially based self-government. Similar claims are likely in Aotearoa/New Zealand where there has been extensive loss of tribal lands and, as well, large scale urbanisation of Maori.[13]

Non-territorial jurisdiction for aboriginal governments challenges common notions of governance over territory and implicates people-based jurisdiction.[14] This type of jurisdiction adds significant complexity to the realisation of aboriginal self-government. Where governing jurisdiction is people-based, non-aboriginal interests become more directly affected. Were this form of self-government to exist, the non-aboriginal population would continue to live under non-aboriginal governmental values and structures, and in their midst, indigenous peoples could elect to be governed in a different manner. This situation is likely to create a backlash which is grounded in the perception that racially-based 'privilege' is being extended to indigenous persons. Even now when aboriginal people in Canada assert their right to exemption from taxation, resentment by the general populace is rife.[15]

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[13] For discussion of this loss of tribal lands: see E.T.J. Durie, "The Process of Settling Indigenous Claims" (Paper presented to the International Symposium on Indigenous Peoples: Rights, Lands, Resources, Autonomy: Vancouver, 20 March 1996) [unpublished] at 3.

[14] See Royal Commission on Aboriginal Peoples, *Towards Reconciliation: Overview of the Fourth Round* (Public Hearings) (Ottawa: Minister of Supply and Services, April 1994) at 62-63: The issue of urban self-government was one focus in Round Four of the Public Hearings of the Canadian Royal Commission on Aboriginal Peoples. A number of proposals were put before the Commission, including one from the Native Council that a model of self-government organised on a community, as opposed to geographic base, is the best approach for accommodating the diversity of aboriginal people in urban areas. Meanwhile the

The reaction of non-aboriginal people to indigenous self-governing jurisdiction forms part of the political reality that affects the likelihood of success of aboriginal claims. Recognition of aboriginal self-government will not occur in a vacuum. Without the support of the non-aboriginal population, self-governing aspirations in both Canada and Aotearoa/New Zealand could well be frustrated.

Ontario Federation of Indian Friendship Centres offered a number of models proposing co-management and self-governing legislation.

[15] See comments of Muldoon J. in *Canada (Canadian Human Rights Commission)* v. *Canada (Department of Indian Affairs and Northern Development) (re Prince)*, [1994] F.C.F. No. 1998, [1995] 3 C.N.L.R. 28 at 40:

> The Indian Act is racist. It countenances the segregation of people by race, into racist enclaves according to racially discriminatory laws. It makes financial dependents of those who pay no taxes as an eternal charge on those who are taxed to meet the expense of such dependency.

Land-based jurisdiction is likely to have a more favourable reaction from non-aboriginal people. This type of jurisdiction has a long and seemingly successful track record in the United States, and has begun to be implemented in Canada.[16]

Given that territorial based self-government is more likely to be recognised and is more likely, it is suggested, to succeed, the resolution of Maori land claims in Aotearoa/New Zealand may be necessary before effective aboriginal self-governance can occur.[17] In Canada it has been argued that the restitution of land and the re-assertion of autonomy cannot be separated.[18] Just as self-government attaches to land, land attaches to self-governance. With this in mind, it may be appropriate for self-governing issues to form part of aboriginal land claims in Aotearoa/New Zealand.

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[16] In the United States context: see A.M. Dussias, "Geographically-based and membership-based views of Indian tribal sovereignty: the Supreme Court's changing vision" (1993) 55 Pittsburgh Law Review 97. Regarding Canada: see G.R. Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) 50 University of Toronto Faculty of Law Review 39.

[17] This issue will be discussed in more depth in chapter seven.

[18] See Cassidy & Bish, *supra* note 2 ar 142.

B) SHARING POWER

Concerns have often been raised regarding the degree of control any community can exercise within a larger polity.[19] Fears have been expressed that self-governance for certain groups could threaten the workability of general governing structures.

State governments in Canada and Aotearoa/New Zealand constantly enter into arrangements which limit their governing authority. Federalism inherently involves dividing sovereignty and governing powers amongst different partners.[20] Even within a unitary state, local and central governments assume distinct governing functions which limit overall state authority.

The recognition of aboriginal self-government would qualify aspects of state governing jurisdiction. However, indigenous self-governance would simply involve a variation on other arrangements which limit Canadian and Aotearoa/New Zealand authority. The workability of general governing structures does not appear to have been threatened by other governmental arrangements. Likewise, this workability would not be endangered by the recognition of aboriginal self-government.

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[19] See D.W. Elliott, ed., *Law and Aboriginal Peoples of Canada*, 2d ed. (North York, Ontario: Captus Press Inc., 1994) at 193. These concerns are relevant to those indigenous claims which assert self-governing powers that will be exercised within the state. They would not be relevant to those claims involving areas on the self-governing continuum which assert governance outside the state.

[20] See B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill Law Journal 308.

All governing systems in Canada are arguably required to respect certain fundamental values expressed in the *Canadian Charter of Rights and Freedoms*, which forms part of the *Constitution Act, 1982*.[21] The need for aboriginal governments to abide by Charter values is precluded by section 25 of the *Canadian Charter of Rights and Freedoms* itself. According to section 25:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including...[22]

This section, by its own terms, overrides other rights and freedoms contained in the Charter. Under section 25, indigenous self-governing arrangements in Canada which are aboriginal or treaty-right based are not bound by the Charter values.

Section 25 of the *Canadian Charter of Rights and Freedoms* stands as a gatekeeper for aboriginal communities, precluding **forced** entry of alien values. Aboriginal governments in Canada do not **have** to govern in accordance with the fundamental values that non-aboriginal governing systems are obliged to uphold. Nonetheless, if indigenous governing authority is to be effective, governments will have to adhere to the values of their communities. It may well be advisable, and reflective of emerging values of aboriginal communities, for such groups to **agree** to abide by the *Canadian Charter of Rights and Freedoms*. Alternately, it may be advisable for communities to develop their own indigenous Charter of Rights.

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[21] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Charter]. For example, it is arguable that under section 31 of the *Sechelt Indian Band Self-Government Act* (S.C. 1986, c.27.) 'Charter values' remain applicable to all decisions made by this community. Fuller discussion of this issue in the indigenous context can be found in M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretative

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Monopolies, Cultural Differences" in R.F. Devlin, ed., *First Nations Issues* (Toronto: Emond Montgomery Publications Limited, 1991) at 40.

[22] Charter, *supra* note 20 at section 25.

C) FINANCING ABORIGINAL SELF-GOVERNMENT

A variety of perspectives exist as to how aboriginal self-government should be financed. In Canada it has been argued that an implied political compact exists which places responsibility for such funding on the federal government:

> Indian peoples have given up Canada's lands and resources to non-Indians, and in exchange, the Canadian government, as the representative of non-Indians, is responsible for financing Indian governments. Such financing should be unconditional and not accompanied by line-item expenditure designations or a myriad of accounting regulations. Indian governments should be responsible to Indian citizens - not to non-Indian governments.[23]

This perspective was paramount during the Third Round of the Public Hearings before the Canadian Royal Commission on Aboriginal Peoples. Although many interveners noted the need for aboriginal governments to eventually finance themselves in the interests of autonomy, caution was voiced about this perspective.[24]

Economic reality in both Canada and Aotearoa/New Zealand dictates that indigenous communities will need considerable financial support from the state to implement self-governance. The creation, or changes in the nature and structures, of governing jurisdiction will be a costly task. Concern has been growing throughout the non-aboriginal population in Canada about financing self-government. Skepticism exists about what is "owed" to aboriginal people.[25] There is a growing body of opinion that if indigenous people want to govern themselves, they should meet the costs of that governance.[26]

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[23] Cassidy & Bish, *supra* note 2 at 169.
[24] See Third Round, *supra* note 10 at 36.

Successful aboriginal self-government in Canada and Aotearoa/New Zealand requires the financial support of the non-indigenous community. The economic wealth of these countries today has largely been gained at the expense of indigenous peoples. Historic expropriation of land and resources upon colonisation invariably excluded aboriginal communities from sharing in wealth which was to be achieved in Canada and Aotearoa/New Zealand. While the details of financing aboriginal self-government must be left to negotiation upon realisation of the right, much of the financial burden does rest in non-aboriginal hands.

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[25] See Cassidy & Bish, *supra* note 2 at 169.

[26] "Nisga'a Settlement Fuels Controversy", *The Globe And Mail* (13 February 1996) at A1.

PART TWO:

REALISING THE RIGHT TO ABORIGINAL SELF-GOVERNMENT IN AOTEAROA/NEW ZEALAND

5. HISTORICAL OVERVIEW

The purpose of this chapter is to outline the historic existence of aboriginal self-government in Aotearoa/New Zealand. The intention is to set the basis from which the ongoing legal status of this right can be recognised and realised.[1]

A) The Nature Of Maori Community

The concept of community is central to the Maori view of human existence. The belief that rights and obligations of the individual and community are interrelated, is perhaps the basic tenet of Maori identity.[2] Given this centrality of community, protecting Maori communities in Aotearoa/New Zealand is significant.[3] With self-government providing one means through which community interests can be protected, realisation of this right becomes important.

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[1] The writer wishes to qualify this chapter with an acknowledgment that her own non-indigenous ancestry and up-bringing put her in no position to comment on the sociological nature of Maori society in Aotearoa/New Zealand. However for the purpose of contextualising Maori self-government, it became necessary to provide a brief discussion of the historic existence of this right. Every effort has been made to ensure credible sources were relied upon in writing this section.

[2] J. Patterson, "A Maori Concept of Collective Responsibility" in G. Oddie & R. Perrett, eds., *Justice, Ethics & New Zealand Society* (Auckland: Oxford University Press, 1992) 11 at 14.

[3] See R.W. Perrett, "Individualism, Justice, and the Maori View of Self" in *ibid.* 27 at 29.

B) Structure Of Traditional Maori Society

The usage of the term 'Maori' is relatively modern in Aotearoa/New Zealand. It was not until the 19th century that autonomous tribes became generally referred to as 'Maori'. This term was adopted by tribes to distinguish *tangata whenua* (people of the land) from those European settlers arriving in Aotearoa/New Zealand.[4] Prior to European contact, inhabitants of the country only identified themselves as part of a *whanau*, a *hapu*, an *iwi*, or sometimes as members of a particular *waka*.[5] This reflected the fact that traditional Maori society involved a number of structured communities which differed in size and make-up.

The basic social unit was the *whanau*.[6] This small community represented an extended family grouping who have blood ties to common ancestors. *Whanau* co-operated in the use of land and defence, and together formed a *hapu* (sub-tribe).[7] An *iwi* (tribe) consisted of several *hapu* who descended from a common ancestor (*tupuna*).[8] In pre-colonial times, Maori were divided into fourty two distinct tribal communities.[9] Tribal confederations (*waka*) were occasionally formed. *Waka* were based on the belief that the constituent tribes had all descended from ancestors of a common canoe in the days of the first great migrations across the Pacific Ocean between 800 and 1200 AD.[10]

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[4] R.C.A. Maaka, "The New Tribe: Conflicts and Continuities in the Social Organization of Urban Maori" (Fall 1994) 6 The Contemporary Pacific 311 at 314.

[5] See A. Hampton, "The Limitations of the Prescriptive Dimensions of Lijphart's Consensus Model: A Case Study of the Incorporation of Maori Within New Zealand's Democratic System 1984 to 1995" (1995) New Zealand Journal of Political Science at 13.

[6] See R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990) at 63 [hereinafter Walker].

[7] K.M. Hazlehurst, *Political Expression and Ethnicity: Statecraft and Mobilisation in the Maori World* (Westport, Connecticut: Praeger Publishers, 1993) at 1-2 [hereinafter Hazlehurst].

[8] M. Wharepouri, "The Phenomenon of Agreement: A Maori View" (1994) 7 Auckland University Law Review 603 at 604-605 [hereinafter Wharepouri].

Although each *hapu* had one chief (*rangatira*), the *iwi* was directed by a paramount leader known as the *ariki*.[11] In terms of decision-making, no *rangatira* or *ariki* could subject their people to an agreement with other groups without the general consensus of the community. Whenever matters arose regarding implications for the *hapu* or *iwi* as a whole, debate would occur on the *marae* (the village courtyard which contained the spiritual and symbolic centre of tribal affairs).[12]

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[9] R. Walker, "Maori People Since 1950" in G.W. Rice, ed., *The Oxford History of New Zealand*, 2d ed. (Auckland: Oxford University Press, 1992) 498 at 498.

[10] Hazlehurst, *supra* note 7 at 1-2.

[11] See J. Metge, *The Maoris* [sic] *of New Zealand*, 2d ed. (London: Routledge & Kegan Paul, 1976) at 24.

[12] See Wharepouri, *supra* note 8 at 605.

C) HISTORIC EXISTENCE OF SELF-GOVERNMENT WITHIN MAORI COMMUNITIES

The historic existence of self-government within Maori communities is as undeniable as in any other organised society.[13] Governing systems were integral to the organisation and structure of communal life. At the time of colonisation, Maori self-government existed in Aotearoa/New Zealand.

Both in relation to and outside of communal activities, etiquette and observance of custom were essential and powerful agents of Maori life.[14] Adherence to *tikanga Maori* (rules of custom) was the primary focus for systems of indigenous governance in Aotearoa/New Zealand.

Custom dictated that Maori communal behaviour be governed by an interlocking system of rank, *tapu* and spiritual belief.[15] Rank involved an *iwi* hierarchical structure of *rangatira* (chiefs), *tutua* (commoners) and *taurekareka* (slaves).[16] The higher an individual's rank in this hierarchy, the greater their personal *tapu*.[17] The power of *tapu* to govern behaviour was directly connected with spiritual beliefs regarding the nature of human existence.[18] *Tapu* had three dimensions of uncleanliness, prohibition and sacredness.[19] Adherence to *tapu* dictated daily actions and governed activities that could be undertaken by certain individuals. For example, women and children were prevented by *tapu* from approaching a *tohunga whakairo* (carver) while he was working.[20]

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[13] Refer to discussion in chapter two.
[14] Wharepouri, *supra* note 8 at 607.
[15] Walker, *supra* note 6 at 67.
[16] Hazlehurst, *supra* note 7 at 1-2.
[17] Walker, *supra* note 6 at 68.

Use of this interlocking system of governance enabled Maori communities to exercise governing jurisdiction over their members. The customary basis of the system implicated principles of *muru* and *utu*.[21] In the event of custom being broken, *muru* dictated the appropriate response by the offended party.[22] Meanwhile, *utu* sanctioned the level of response and compensation required.[23] *Utu* could be extracted in varying degrees. It could involve simple payment or, at the more serious level, plundering of goods and physical punishment.[24]

Despite the existence of Maori self-governance, the Aotearoa/New Zealand courts held in 1877 that:

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[18] *Ibid.*

[19] *Ibid*:

> Tapu in the sacred sense applied to people of rank, places of worship and ancestral houses. Tapu in the prohibited sense applied to pursuits such as carving... Tapu in the unclean sense applied to menstrual blood, which prevented women from gardening or other pursuits connected with food.

[20] *Ibid.* at 67.

[21] See *ibid.* at 69.

[22] See Wharepouri, *supra* note 8 at 606.

[23] *Ibid.*

[24] See Walker, *supra* note 6 at 69.

> On the foundation of this colony, the aboriginees were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at that time could it be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.[25]

Nothing could have been more further from the truth. These assertions were conveniently self-serving. As has been demonstrated by the foregoing, Maori governance clearly existed at the time of British settlement. What has been lacking is non-indigenous recognition of this simple fact.

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[25] *Wi Parata* v. *The Bishop of Wellington and the Attorney-General* (1877), 3 NZ Jur (NS) SC 72 (Supreme Court).

6. THE LEGAL STATUS OF ABORIGINAL SELF-GOVERNMENT IN AOTEAROA/NEW ZEALAND

Common law aboriginal rights provide a legal basis for self-government in Canada. Viewed through the lens of Canadian jurisprudence, similar self-governing rights exist under the Treaty of Waitangi in Aotearoa/New Zealand. This Treaty is central to **all** Maori claims.

A) THE TREATY OF WAITANGI

1. PRE-TREATY EVENTS IN AOTEAROA/NEW ZEALAND

In October 1835, a coalition of northern chiefs and the British Crown, represented by their 'Official Resident' James Busby, issued *He Wakaputanga o te Rangatiratanga o Nu Tireni* - the *Declaration of the Independence of New Zealand*[1] [the Declaration[2]]. The Declaration was a British initiative, motivated by fear of French intentions regarding Aotearoa/New Zealand.[3] Under the terms of its first clause, an independent state was declared under the name of the "United Tribes of New Zealand".[4] According to the second clause:

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[1] J. Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989* (Wellington: Allen & Unwin New Zealand, 1990) at 6 [hereinafter Kelsey].

[2] Refer Appendix Three.

[3] See C. Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Limited, 1995) at 21 [hereinafter Orange].

> All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of the Government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.[5]

Provision was made for the annual assembly of this congress, with an invitation for southern tribes to join the confederation.[6]

The Declaration acknowledged the sovereignty of Maori over Aotearoa/New Zealand. The British Crown accepted in clause two that all power and authority rested in the indigenous confederation. The exclusive authority to appoint people to carry out functions of government was held by this group.

Inter-tribal fighting which pre-existed the Declaration continued after its enactment. Maori nationalism was totally alien to tribal society.[7] Busby's attempt to unite tribal governance under the Declaration was predicated on a fundamental British failure to understand the nature and politics of Maori communities. These communities were fiercely independent and did not share power. Busby concluded that it was impossible to create a central administration amongst fiercely independent tribal communities.[8]

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[4] R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990) at 88 [hereinafter Walker].

[5] *Ibid.*

[6] See Kelsey, *supra* note 1 at 7.

By 1839, accounts of social disorder by Busby, increasing settler numbers, plans by the New Zealand Association to systematically colonise the country, and urgings of the missionaries, prompted British Crown action.[9] Captain Hobson was dispatched from London with instructions from Lord Normandy to enter into a treaty of cession with the Maori tribes of Aotearoa/New Zealand.[10] The nature of these instructions reflected Busby's belief in the impossibility of achieving any semblance of a larger Maori polity. As expressed by Normandy:

> I have already stated that we acknowledge New Zealand as a Sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to eachother, and are incompetent to act as even deliberate in concert. But the admission of their rights, though inevidently qualified by this consideration, is binding on the faith of the British Crown.[11]

It has been suggested that Normandy's instructions reveal the dilemmas associated with recognition of Maori rights. In many ways:

> Normandy had to recognise Maori independence, even a sovereignty of sorts, but he also had to negate it; he had to allow for British colonisation and investment in New Zealand, yet regret its inevitability; and he had to show that justice was being done the Maori people by British intervention, even while admitting that such intervention was nevertheless injust.[12]

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[7] Walker, *supra* note 4 at 89.
[8] See *ibid.*
[9] *Ibid.*
[10] See Orange, *supra* note 3 at 29-31.
[11] M. Chen & G. Palmer, *Public Law in New Zealand* (Auckland: Oxford University Press, 1993) at 295 [hereinafter Chen & Palmer].
[12] Orange, *supra* note 3 at 30.

Because the admission of Maori rights had occurred through the Declaration[13], and was "binding on the faith of the British Crown", no claim to New Zealand was to be made "unless the free and intelligent consent of the Natives, expressed according to their established usages" was obtained.[14] This was the task that faced Hobson upon his arrival in Aotearoa/New Zealand.

2. ENTERING THE TREATY

Having received instructions from Normandy, Hobson prepared notes regarding the Treaty. These were later passed to Busby, and two officers from the 'H.M.S. Herald', who drafted the initial version of *Te Tiriti o Waitangi* (the Treaty of Waitangi).[15] While Hobson continued to revise the treaty document, this draft was translated into Maori by Williams, a local missionary. The translated version was the basis for discussion with assembled northern Maori chiefs at Waitangi on 5 February 1840.[16] As a result of these discussions, alterations were made to the treaty document and a revised version of the Maori translation presented to the chiefs for signature on 6 February 1840.[17]

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[13] Crown law experts at the time were also aware that, on at least three occasions, British statutes had noted Aotearoa/New Zealand as being outside British dominion: See *ibid.* at 2.

[14] *Ibid.* at 31.

[15] Walker, *supra* note 4 at 90.

[16] See D.F. McKenzie, *Oral Culture, Literacy & Print in early New Zealand: the Treaty of Waitangi* (Wellington: Victoria University Press *with the* Alexander Turnball Library, 1985) at 32-33 [hereinafter McKenzie].

In ensuing months, copies of the Treaty were taken throughout the country and many tribal chiefs were persuaded by official Crown parties to sign.[18] In total, over five hundred Maori chiefs signed a version of the Treaty of Waitangi.[19] All except thirty nine signed the Maori version.[20] It has been suggested that this Maori version was a translation of an English text which was subsequently lost.[21] The result of the many efforts to prepare a treaty document were four English and one Maori version, the latter not corresponding directly to any of the former.[22] The final 'official' English version of the Treaty submitted to the Colonial Office does not match the Maori version which most chiefs signed.[23] Although other versions do exist, it is now accepted that the two official texts of the Treaty are the Maori and English versions appended to the first schedule of the *Treaty of Waitangi Act 1975*.[24]

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[17] *Ibid.*

[18] Orange, *supra* note 3 at 86-87:

> In negotiating the treaty, the language of persuasive diplomacy was critical to success. The element of protection was much emphasised at all treaty meetings... Negotiators took advantage of Maori antagonism towards the French by drawing comparisons between the British, who had peacefully entered the country, and the French who, it was alleged, would have forcibly acquired New Zealand, given the chance.

[19] K.M. Hazlehurst, *Political Expression and Ethnicity: Statecraft and Mobilisation in the Maori World* (Westport, Connecticut: Praeger Publishers, 1993) at 4. However, recent controversy surrounding the precise number of signatories should be noted: see Orange, *supra* note 3 at 260.

[20] A. Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990) at 15.

[21] P. Cleave, *The Sovereignty Game: Power, Knowledge and Reading the Treaty* (Wellington: Institute of Policy Studies for Victoria University Press, 1989) at 40-41 [hereinafter Cleave].

[22] Walker, *supra* note 4 at 90.

[23] See *ibid.* at 91.

Though there are differences in the two texts, both versions basically consist of three articles[25] preceded by a preamble.[26] In article one of the English version, the "Chiefs of the Confederation" and the "separate and independent chiefs" are deemed to "cede to Her Majesty, the Queen of England, absolutely and without reservation all the rights and powers of Sovereignty" which they exercised or possessed within their territories.[27] By contrast, according to the Maori version, only *kawanatanga* was ceded. This concept has been retranslated to English as an absolute cession of the "government" of Maori lands.[28] There is even some doubt that this form of cession was intended. As Walker has observed:

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[24] This is the statute enacting the Waitangi Tribunal: See E. Stokes, "The Treaty of Waitangi and the Waitangi Tribunal: Maori Claims in New Zealand" in G. Cant, J. Overton & E. Pawson, eds., *Indigenous Land Rights in Commonwealth Countries* (Christchurch: Department of Geography, University of Canterbury and the Ngai Tahu Maori Trust Board for the Commonwealth Geographical Bureau, 1993) at 66 [hereinafter Stokes].

[25] See Race Relations Office, "The Treaty: Te Tiriti o Waitangi" [undated]: A fourth article is sometimes included within the Maori version of the Treaty. It appears that before any signings at Waitangi, questioning from the Catholic Bishop Pompallier resulted in Hobson reading the following statement to Maori chiefs:

> E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki e tiakina ngatahitia e ia.
>
> The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Maori custom shall alike be protected by him.

For further consideration of this issue, refer to Orange, *supra* note 3 at 53.

[26] Refer Appendix Four.

[27] Orange, *supra* note 3 at 40.

[28] Refer to the English translation of the Maori version contained in Appendix Four.

> [kawanatanga] is derived from a transliteration of governor into kawana, which, with the addition of the suffix tanga, becomes governance. Although some of northern chiefs had met a governor in New South Wales, there was no model or referent for a governor in New Zealand, and we can only imagine what the chiefs thought they were conceding to such a person.[29]

In return, article two of the English version provided that the "Chiefs and Tribes of New Zealand" would be protected in "the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess".[30] This did not correspond with the Maori text where the guarantee was for *te tino rangatiratanga*. The difference between the two versions is profound. In this regard, Orange has argued:

> By this article the Queen guaranteed the tribes 'tino rangatiratanga', the absolute chieftainship, over their lands, homes and treasured possessions. Tino rangatiratanga was a much closer approximation to sovereignty than kawanatanga. The word rangatiratanga is a missionary neologism derived from rangatira (chief), which, with the addition of the suffix tanga, becomes chieftainship. Now the guarantee of chieftainship is in effect a guarantee of sovereignty, because an inseparable component of chieftainship is mana whenua. Without land a chief's mana and that of his people is negated. The chiefs are likely to have understood the second clause of the Treaty as a confirmation of their own sovereign rights in return for a limited concession of power in kawanatanga.[31]

The third article is the least problematic. Under the English version, the protection of the Queen was extended to Maori who were granted "all the rights and privileges of British subjects".[32] To this effect, the Maori text is reasonably equivalent.

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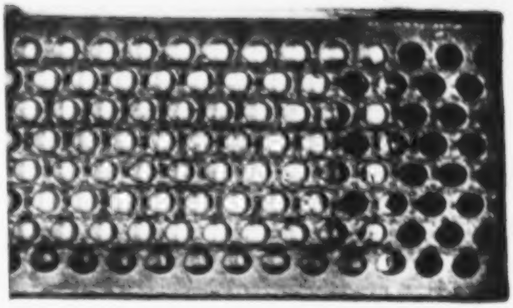
[29] Walker, *supra* note 4 at 92.
[30] Refer to English version of the Treaty of Waitangi contained in Appendix Four.
[31] Walker, *supra* note 4 at 93.
[32] Orange, *supra* note 3 at 42.

SELF-GOVERNMENT UNDER THE TREATY

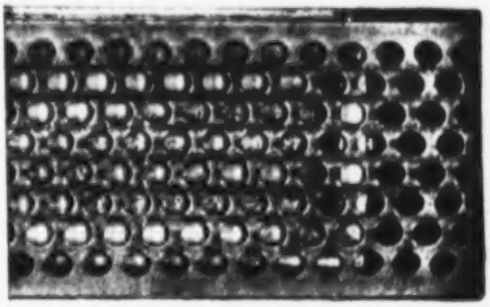


erent language versions of the Treaty of Waitangi ut post-1840 history in Aotearoa/New Zealand. o *rangatiratanga* and *kawanatanga*. In evaluating the legal status of aboriginal self-government, an essential.

st and second articles of the Treaty of Waitangi *anatanga* is subject to a promise to protect bject to an acknowledgment of *kawanatanga*".[33] hese concepts is pivotal to the determination of the e at domestic law in Aotearoa/New Zealand.

TIRATANGA AND KAWANATANGA

iratanga in the second article of the Maori version surrounding sovereignty and governing authority in his term is closer in meaning to sovereignty than is



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ciples for Crown action" (1989) 19 V.U.W.L.R. 335 at 340.

kawanatanga.[34] *Rangatiratanga* had been used in the 1835 Declaration of Independence in which Maori sovereignty had been acknowledged by the British Crown. Maori understanding of the Treaty was undoubtedly premised on beliefs that the independence and sovereignty they had affirmed in 1835 could not be nullified by treaty.[35]

Tribal chiefs may well have assumed that their rights were actually being confirmed, at the expense of a limited cession of power in *kawanatanga*.[36] In fact it has been argued:

> that if rangatiratanga had been used instead of kawanatanga, the Treaty would not have been signed in February 1840, for no chief could have been persuaded to surrender his rangatiratanga, not even to the Queen of England.[37]

Thus, in translating the Treaty of Waitangi it appears a "number of important concepts which may have been contentious or a hindrance to the acceptance of the otherwise innocuous document were avoided".[38] In this way, any sense of the Treaty as a document of political appropriation was muted.[39]

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[34] Orange, *supra* note 3 at 41. See also A. Fleras & J.L. Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992) at 229:

> Although various interpretations exist concerning the status of Maori sovereignty (mana Maori motuhake) and the Treaty of Waitangi, a dominant Maori view is that mana (power) is equivalent to sovereignty. Since mana and rangatiratanga are inseparable, it is argued that in guaranteeing rangatiratanga the Treaty effectively acknowledged the inherent sovereignty of the Maori...

[35] See McKenzie, *supra* note 16 at 41.

[36] Orange, *supra* note 3 at 41.

[37] I.H. Kawharu, *Maori Land Tenure: Studies of a changing institution* (Oxford: Oxford University Press, 1977) at 6 [hereinafter Kawharu].

[38] Cleave, *supra* note 21 at 42-43.

[39] See McKenzie, *supra* note 16 at 41.

Given that *kawanatanga* was used instead of *rangatiratanga*, the issue arises as to what was actually ceded by Maori chiefs during 1840. In Kawharu's commonly accepted translation into English of article one of the Maori text,[40] *kawanatanga* was expressed as the cession of "government".[41] Accepting this translation may have implications for the ongoing status of the legal right to aboriginal self-government in Aotearoa/New Zealand. However, it has been argued that *kawanatanga* in 1840 should be interpreted as referring to 'governorship', not government.[42] While this may seem a fine distinction, it is of crucial importance.

Maori understanding of the English word 'government' in 1840 must be placed in a cultural context. Although some northern chiefs had previously met with a 'governor' in Australia, it is very likely that Maori understanding of governorship would have differed from the European notion of government.[43] Limited knowledge as to the functions of a governor could hardly have alerted Maori to the machinery of government that inevitably accompanied this office:

> Maori had no experience of the sort that power might be assumed over them not only by governors, but by government officials, government commissioners, common law courts and - before long - by settler parliaments and their ministries. How could Maori have foreseen the challenge to their political and cultural autonomy which would follow the establishment of a new state by the British? In the lifetime of one generation, the political, social, and economic landscape of Aotearoa was to alter dramatically, and communities throughout the islands had

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[40] See I.H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).
[41] Refer Appendix Four.
[42] Cleave, *supra* note 21 at 4.
[43] *Ibid.*

> to make decisions about how to survive in a country increasingly run by Pakeha.[44]

While Maori chiefs would have understood much of what they were retaining in *rangatiratanga*, it is very unlikely that they had any appreciation of what they were **perceived** as giving away in *kawanatanga*.[45]

According to a central philosophy of Maori life, it would have been impossible for *rangatira* to give up governmental authority over internal matters.[46] Such governance was integral to both chiefly and community *mana*. As Davies and Ewin have observed, *rangatira* would have believed that:

> Maori peoples retained their authority over their taonga, their lands and their own affairs: Queen Victoria took control over foreign affairs, over the settlers, over the purchase and sale of Maori lands, and (perhaps) over intertribal relations.[47]

To Maori, the cession of *kawanatanga* involved external matters - not the loss of self-governance. However throughout post-1840 history, the first article of the Treaty of

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[44] A. Parsonson, "The Challenge to Mana Maori" in G.W. Rice, ed., *The Oxford History of New Zealand*, 2d ed. (Auckland: Oxford University Press, 1992) 167 at 167. In terms of reference to "Pakeha", see Walker, *supra* note 4 at 297.

[45] Kawharu, *supra* note 37 at 6-7.

[46] M. Jackson, "The Treaty and the Word: The Colonization of Maori Philosophy" in G. Oddie & R. Perrett, eds., *Justice Ethics & New Zealand Society* (Auckland: Oxford University Press, 1992) 1 at 7 [hereinafter Jackson].

[47] S. Davies & R.E. Ewin, "Sovereigns, Sovereignty, and the Treaty of Waitangi" in *ibid.* 41 at 52. In *New Zealand Maori* Council v. *Attorney-General*, [1987] 1 N.Z.L.R. 641 at 715 Bisson J noted that in entering the Treaty:

> Maori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga.

[hereinafter *N.Z.M.C. [1987]*]

Waitangi has been assumed by the majority of people in Aotearoa/New Zealand as ceding full Maori sovereignty to the British Crown. The assertion of European [hereinafter Pakeha] governing authority over **all** inhabitants of the country has been, and continues to be, part of this assumption.

The giving up of *kawanatanga* and the retention of *te tino rangatiratanga* in the Maori text is incompatible with the notion of absolute governing authority by Pakeha.[48] The Treaty itself "was an acknowledgment of Maori existence... of an intent that the Maori presence would remain and be respected".[49] An integral part of this presence was the acknowledgment of the right to remain self-governing.

2. TREATY INTERPRETATION

The Canadian courts have held that any ambiguity in the terms of a treaty should be interpreted in order to uphold the rights of the signatory tribes.[50] La Forest J in *Mitchell* v. *Peguis Indian Band* discussed *Nowegijick* v. *M.N.R.*,[51] and stated that:

> treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown

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[48] The Waitangi Tribunal and the Court of Appeal have accepted that Maori did cede legal sovereignty under the Treaty in 1840: *N.Z.M.C [1987], ibid.*; Waitangi Tribunal, *Muriwhenua Fishing Report* (Wellington: Department of Justice, 1988) 22 at 194-195: "The Treaty extinguished Maori sovereignty and established that of the Crown" [hereinafter *Muriwhenua*].

[49] Waitangi Tribunal, *Motuni-Waitara Report* (Wellington: Department of Justice, 1983) 3 at para. 10.3.

[50] M. Wharepouri, "The Phenomenon of Agreement: A Maori View" (1994) 7 Auckland University Law Review 603 at 613 [hereinafter Wharepouri].

[51] *Nowegijick* v. *M.N.R.*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41.

> enjoyed a superior bargaining position when negotiating treaties with native peoples... it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.[52]

Adopting this approach in Aotearoa/New Zealand would, in case of doubt, support the Maori version of the Treaty enjoying paramountcy over the English version. This was the language text that Maori understood at the time of signing in 1840. It was the version around which discussions at Waitangi and subsequent treaty meetings were based.[53] It was the text signed by the overwhelming majority of Maori communities throughout the country.

The Supreme Court of Canada in *R.* v. *Simon* has described indigenous treaties as *sui generis*.[54] The Court recognised that indigenous treaties should not fully be considered either international or domestic documents. Meanwhile, the Aotearoa/New Zealand courts appear to be operating under the theory that the Treaty of Waitangi is international in nature, hence the statutory incorporation rule. However, under international law itself, treaties between indigenous peoples and states may have a different status than treaties amongst states. Indigenous peoples are given special and distinct treatment at international law.[55] They are not treated as Nation States. Hence, **treaties** between indigenous peoples and states could likewise be given special treatment

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[52] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 142-43, [1990] 3 C.N.L.R. 46 at 64. It was also noted at S.C.R. 98 that "aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical construction".
See also Y. Chang, *The Interpretation of Treaties By Judicial Tribunals* (New York: Ams Press, 1968) at 155: "in Worcester v. Georgia, Justice M'lean said:

> The language used in treaties with the Indians should never be construed to their prejudice... How the words of the treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction".

[53] See Jackson, *supra* note 46 at 7.

As noted by Robert Reiter, the unique status of indigenous treaties has enabled the Canadian courts to use **both** international agreements and domestic contracts when **interpreting** indigenous treaties.[56] Applying principles from both international and domestic spheres, it was held in *R.* v. *Blackfoot Band of Indians* that treaty terms should be interpreted against the drafter of these treaties and not to the prejudice of indigenous signatories.[57] Given that representatives of the British Crown drafted the Treaty of Waitangi, this finding further supports the prevailing nature of the Maori version in determining those rights guaranteed under the Treaty.

Under the *Treaty of Waitangi Act, 1975*, the Waitangi Tribunal[58] is statutorily required to have regard to **both** texts of the Treaty.[59] However, the Act does not specify

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[54] *R.* v. *Simon*, [1985] 2 S.C.R. 387, affirming [1982] 1 C.N.L.R. 118 (N.S.C.A.).

[55] Refer to international law discussion in chapter two.

[56] R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing Inc., 1995) at I 16.

[57] *R.* v. *Blackfoot Band of Indians*, [1987] 2 C.N.L.R. 63 (F.C.T.D.). This is similar to adoption of the *contra proferentum* principle by the Waitangi Tribunal in Waitangi Tribunal, *Ngai Tahu Report* (Wellington: Brooker & Friend Ltd., 1991) [hereinafter *Ngai Tahu Report*]: The *contra proferentum* principle was held as stating that where there is ambiguity surrounding meaning of a treaty, the interpretation of the party which did not draft the document takes precedence. However, while the Tribunal described the *contra proferentum* principle as founded in international law, the writer was unable to find a basis at international law for this rule.

[58] In 1975 Parliament enacted legislation creating the Waitangi Tribunal: *Treaty of Waitangi Act, 1975*, No. 114, Vol. 2. See Stokes, *supra* note 24 at 77: The primary task of the Tribunal is to determine whether any complaint arising under section 6 of the Act "was or is inconsistent with the principles of the Treaty of Waitangi". See also Chen & Palmer, *supra* note 11 at 332: Jurisprudence developed by the Waitangi Tribunal has been used by the courts in defining key terms in the Treaty. The "Court of Appeal

the **relative degrees** of regard the Tribunal must pay to these versions. In the Waitangi Tribunal's *Ngai Tahu Report*, it was noted that:

> In the case of the Treaty of Waitangi, with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori. This is consistent with the contra preferentum rule that where an ambiguity exists, the provision should be construed against the party which drafted or proposed the provision, in this case the Crown.[60]

The Court of Appeal and Privy Council have also adopted the approach of having regard to both texts.[61] This approach has lead to interpretation in Aotearoa/New Zealand based on 'principles' of the Waitangi document, as opposed to actual Treaty terms.[62] Principles have been applied because of the difficulties surrounding literal words of the opposing language texts of the Treaty.[63]

In developing these principles, it is appears that both the courts and Waitangi Tribunal have tended to give greater weight to the Maori version of the Treaty. One

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has reaffirmed that it is not bound by Waitangi Tribunal reports, but various judges have stated that such reports should be given considerable weight".

[59] *Ibid.* in section 5(2). Note amending Acts in 1985 and 1988.

[60] *Ngai Tahu Report, supra* note 56 at Vol. 2, 223-224.

[61] C. Wickliffe, *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* (Report prepared for New Zealand Parliamentary Commissioner for the Environment, 1994) at 86 [hereinafter Wickliffe].

[62] See S. Kenderdine, "Legal Implications of Treaty Jurisprudence" (1989) 19 V.U.W.L.R. 347 at 367: In terms of section 9 of the *State Owned Enterprises Act 1990*, it has been held that:

> Inconsistent with the principles of the Treaty' in preference to one such as 'inconsistent with its terms or conditions' points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that document...

[63] *NZMC [1987], supra* note 47 per Bisson J at 714

central principle is that the cession of *kawanatanga* was an exchange for the protection of *tino rangatiratanga*.[64] As emphasised by the Waitangi Tribunal in the 1994 *Maori Electoral Option Report*:

> if we look beyond the strict literal meaning of the Treaty to its broader **principles**, it is clear that the exercise of tino rangatiratanga, like kawanatanga, cannot be unfettered; the one must be reconciled with the other [emphasis added].[65]

Reconciling *tino rangatiratanga* with *kawanatanga* has lead to development of the interpretative principle of 'partnership'.[66] President Cooke noted in *New Zealand Maori Council* v. *Attorney-General [1987]* that the "Treaty signified a partnership between races" and that in modern times there is an emphasis "on the need to preserve Maori taonga, Maori land and communal life, a distinct Maori identity".[67]

Adoption of the 'principles' approach when interpreting the Treaty of Waitangi has not avoided criticism.[68] In recent years there appears to be a move towards

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[64] Stokes, *supra* note 24 at 77.

[65] Waitangi Tribunal, *Maori Electoral Option Report* (Wellington: Brooker & Friend Ltd., 1994) at 23. See also T.O. Ellias, *The Modern Law of Treaties* (Netherlands: A.W. Sijthoff International Publishing Company B.V., 1974) at 86-87: Resolving ambiguities by reconciling divergent texts of plurilingual treaties was emphasised by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions Case*.

[66] Partnership was first discussed in the Court of Appeal in *N.Z.M.C. [1987], supra* note 47 and developed in *Tainui Maori Trust Board* v. *Attorney-General*, [1989] 2 N.Z.L.R. 513; *New Zealand Maori Council* v. *Attorney-General*, [1989] 2 N.Z.L.R. 142; *Attorney-General* v. *New Zealand Maori Council*, [1991] 2 N.Z.L.R. 129. This principle has also been affirmed by the Waitangi Tribunal: *Muriwhenua, supra* note 48; *Ngai Tahu, supra* note 56.

[67] *N.Z.M.C. [1987], supra* note 47 at 664. See also Casey J at 703-704.

[68] See A.L. Mikaere, "Maori Issues I" [1990] NZ Recent Law Review 122 at 138: comments of Governor-General, Sir Paul Reeves in 1989:

> talk of principles reflect a measurement based approach to social realities. If you can measure it, then it is respectable and valid; if you can't, it is suspect and dangerous. On the other hand, Maori talk about

interpretation in light of the 'spirit' or 'essence' of the Treaty. In the *Te Roroa Report*, the Waitangi Tribunal based their findings on the "the vital essence of the Treaty" and relegated the "principles of the Treaty" to a footnote.[69] Recent Canadian decisions have also emphasised the 'spirit and intent' of the treaties as a central focus of judicial consideration.[70]

Interpretation based on the spirit or essence of the Treaty of Waitangi should look to the paramountcy of the Maori version. According to Canadian jurisprudence, treaty provisions should be construed as the aboriginal parties would have understood them. Adopting this approach in Aotearoa/New Zealand would elevate the status of the Maori Treaty text above the English. The paramountcy of the Maori text is in keeping with the emergence of the 'principles' approach where emphasis seems to have been placed on Maori concepts as opposed to english terminology.[71] In this context, the spirit or essence

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> the spirit of the Treaty and that speaks of an oral tradition which encompasses debate and consensus. The spirit of the Treaty can be recovered only of the Treaty text is regarded not simply as the words put together by Hobson, Busby, Williams and others but also as the product of a social situation faced by Maori and Pakeha at that time.

[69] Waitangi Tribunal, *Te Roroa Report* (Wellington: Department of Justice, 1992) 5 at 32. The footnote reads:

> We have taken the word "principles" ... to mean "fundamental source" or "fundamental truth as basis for reasoning" (Concise Oxford Dictionary, 7th ed). We have not isolated "Principles". To assist us, we have kept in mind what was fair, having regard to the continuing obligations under the Treaty; what was reasonable, having regard to the actions of the respective parties; and what was proper, having regard to the outcome between both parties'.

[70] Refer earlier discussion regarding treaty interpretation in chapter three.

[71] For a full discussion of the principles of the Treaty of Waitangi, see J. Munroe, "The Treaty of Waitangi and the Sealord Deal" (1994) 24 V.U.W.L.R. 389; Chen & Palmer, *supra* note 11 at 419; *N.Z.M.C. [1987]*, *supra* note 47.

of the Treaty of Waitangi supports recognition of a continuing right to self-governance by Maori communities.

3. CURRENT STATUS OF ABORIGINAL SELF-GOVERNMENT IN AOTEAROA/NEW ZEALAND

Maori self-government has common law status as both an aboriginal and treaty right at domestic law in Aotearoa/New Zealand. Maori governance meets the *Delgamuukw* test of being a "practice, custom or tradition that is sufficiently significant and fundamental to the culture and social organisation of a particular group of aboriginal people as to command recognition as an aboriginal right".[72] This right was affirmed by the Treaty of Waitangi in 1840.[73]

In recent years the courts and Waitangi Tribunal have identified the right to "tribal self-regulation" as that remnant of sovereignty retained by Maori subsequent to 1840.[74] According to the Court of Appeal in *New Zealand Maori Council [1987], te tino rangatiratanga* was seen as providing a basis for Maori self-regulation over their collectively owned resources. Meanwhile in the *1988 Muriwhenua Report*, the Waitangi

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[72] *Delgamuukw* v. *R. In Right of B.C. And A.G. Canada*, [1993] 5 C.N.L.R. 1, 104 D.L.R. 470 (B.C.C.A.) reversing [1991] 5 C.N.L.R. 1, 79 D.L.R. (4Th) 185 (B.C.S.C.) at 517 [hereinafter *Delgamuukw*]. See discussion in chapter five regarding the historic existence of Maori government.
[73] Note discussion in chapter three, that the Waitangi Tribunal has adopted the view that treaty rights and aboriginal rights exist side-by-side.
[74] See A.L. Mikaere & D.V. Williams, "Maori Issues" [1991] NZ Recent Law Review 149 at 158.

Tribunal stated that "tino rangatiratanga... refers not to a separate sovereignty but to tribal self-management on lines **similar** to what we understand by local government".[75]

In the 1994 *Maori Electoral Option Report,* the Tribunal emphasised that Maori may be "entitled... to a measure of autonomy, but not full independence outside the nation state that they helped to create in signing the Treaty." The right to self-government exists, but it appears limited to internal matters.

It is interesting to note the similarities between the Canadian judiciary's approach to aboriginal self-government, and that of the courts and Tribunal in Aotearoa/New Zealand. In both jurisdictions, judicial opinion seems to be that full and plenary powers have been lost.[76] What specific powers of governance are retained in modern times is a somewhat open question in both jurisdictions.

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[75] *Muriwhenua, supra* note 48 at 187.

[76] In this way the self-government continuum discussed in chapter two has been limited by the judiciary in both Canada and Aotearoa/New Zealand.

C) THE LEGAL STATUS OF THE TREATY OF WAITANGI IN AOTEAROA/NEW ZEALAND

The legal status of the Treaty of Waitangi in Aotearoa/New Zealand is significant regarding judicial enforceability of those rights it guarantees to Maori communities.

1. THE TREATY OF WAITANGI WITHIN THE AOTEAROA/NEW ZEALAND CONSTITUTIONAL FRAMEWORK

There is no written constitution in Aotearoa/New Zealand. The constitutional framework involves various statutes and unwritten conventions.[77] Within this framework, the standing of the Treaty of Waitangi is somewhat obscure.

Although the Treaty is widely acknowledged as the founding document of the colonial state, it is not entrenched within the constitutional framework. In fact, the Aotearoa/New Zealand courts have yet to determine exactly what the legal status of this Treaty is. Over the years, judicial treatment of this document has remained ambiguous:

> is the Treaty properly viewed as a purely domestic law contract; or is it an international Treaty to be construed in accordance with the international law of treaties... ; or should it be approached as a basic constitutional document evolving in its application to changing circumstances over the years?[78]

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[77] Wickliffe, *supra* note 60 at 86.
[78] *N.Z.M.C. [1987]*, *supra* note 47 at 655.

Recent decisions of the judiciary have arguably reflected new sensitivity to the Treaty of Waitangi.[79] It has been noted that the courts have altered the application of the Treaty in a number of cases to reflect changing political, social and economic climates within Aotearoa/New Zealand society.[80] However the conservative legal position remains - rights guaranteed under the Treaty of Waitangi are not enforceable in a court of law without statutory incorporation.[81] This 1941 Privy Council ruling[82] has effectively denied legal status to the guarantees provided under the Treaty, or at least delayed such status to a time when there will be parliamentary recognition.[83] That rights affirmed by a treaty, including the right to self-government, must be incorporated into statute before they become legally enforceable, has been described as trite law.[84]

2. Enforceability Of Treaty of Waitangi Rights

Without statutory incorporation, the Treaty of Waitangi cannot provide enforceable legal status for Maori self-government. The Treaty has been held to cede sovereignty to Pakeha and thereby legitimated the imposition of foreign control over indigenous communities.[85] It seems quite contradictory that when the Treaty is raised as a guarantor of Maori rights, its legal effect is vitiated by the requirement of parliamentary recognition.

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[79] Wharepouri, *supra* note 50 at 612.

[80] *Ibid.*

[81] The most recent expression of the orthodox view was McKay J in *New Zealand Maori Council* v. *Attorney-General*, [1992] 2 N.Z.L.R. 576 at 591 (CA).

[82] *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308 (Privy Council).

[83] The *Hoani Te Heuheu Tukino* view can be compared to statements of Cooke P who has indicated recently that fundamental questions about the status of the Treaty of Waitangi are still to be determined: see *Te Runanga o Wharekauri Rekohu* v. *Attorney-General*, [1993] 2 N.Z.L.R. 301 at 305.

[84] R.P. Boast, "Treaty rights or aboriginal rights?" (1990) N.Z.L.J. 32 at 33. See also comments in chapter three.

That the Treaty has been held as ceding sovereignty to Pakeha places the Aotearoa/New Zealand judiciary in a quandary regarding the statutory incorporation rule. The Treaty of Waitangi has never been statutorily incorporated.[86] As such, any assertion of British sovereignty on the basis of the Treaty being one of cession has no legal status.[87] This implication has direct relevance for the existence of self-government as an aboriginal right in Aotearoa/New Zealand.

Even if Maori self-governance cannot be legally enforced as a treaty right, the doctrine of continuity posits that aboriginal rights are part of the common law of Aotearoa/New Zealand.[88] If there has been no cession of sovereignty, an aboriginal right to full and plenary powers of self-government may still exist. The only real challenge to this assertion is the doctrine of extinguishment. Extinguishment of the aboriginal right of the Maori to self-govern occurs if the 'clear and plain intention' test, or its corollary, the

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[85] The Waitangi Tribunal and the Court of Appeal have accepted that Maori did cede legal sovereignty under the Treaty in 1840, *supra* note 48.

[86] Even if it was arguable that there has been **some** statutory incorporation of the Treaty of Waitangi, an estoppel argument could be made. If the assertion of British sovereignty over Aotearoa/New Zealand is regarded as founded in the Treaty of Waitangi, the judiciary must be estopped from using the statutory incorporation rule to deny Maori treaty rights. In order for the assertion of British sovereignty under the Treaty to have a legal basis, the Treaty must have been incorporated. Parliament could not have incorporated **one** aspect of the Treaty without the rest of the document. Maori rights under the Treaty must also have a legal basis which meets the statutory incorporation requirement.

[87] The writer wishes to acknowledge the suggestions of Professor Litman regarding this issue.

'necessary implication' doctrine, is satisfied. These tests of extinguishment, in the Aotearoa/New Zealand context, would be considerably more difficult to satisfy than the same tests in the Canadian context.

The Canadian cases have held that under the *British North America Act*, **all** legislative powers have been distributed to the federal and provincial governments.[89] Under this theory there are no residual legislative powers available to be exercised by a third order of (aboriginal) governments. On the other hand, not surprisingly, jurisprudence from Aotearoa/New Zealand does not address the issue of legislative division of power. Accordingly, the assertion that the aboriginal right of self-government has been extinguished by the distribution of **all** legislative power within the state to entities other than aboriginal governments is more difficult to make out in Aotearoa/New Zealand than it is in Canada. It follows that even if the statutory incorporation rule is an insurmountable hurdle to establishing Maori self-government as a treaty right, there is a strong basis for recognising the right as an aboriginal right.

With respect to the statutory incorporation rule, the Aotearoa/New Zealand judiciary appears to have placed itself in a difficult dilemma. The law cannot approbate

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[88] Refer to earlier discussion in chapter three concerning the doctrine of continuity.

[89] See B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" [1991] 36 McGill Law Journal 308. See also comments of the majority in *Delgamuukw,supra* note 71 as discussed in chapter two: according to Justice Macfarlane, the division of powers under the *Constitution Act, 1867* left no room for a third order of government.

and reprobate at the same time. If the Treaty has not been incorporated there is no legitimate basis for British sovereignty, other than the doctrine of discovery. Although this doctrine has been somewhat discredited,[90] concerns regarding the doctrine have not gone so far as to repudiate the sovereignty of the colonising state.[91] However, and this point is critical, the sovereignty of the colonising state does not *per se* abrogate the governing authority of indigenous peoples.[92] This authority persists as a common law right, under the doctrine of discovery, unless, of course, extinguished.

Whether the Maori right to self-government is based on treaty or is an aboriginal right, the provision of a recognised legal basis for this right, either legislative or constitutional, would be of considerable utility. Doing so would certainly eradicate the difficulties surrounding the statutory incorporation rule.

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[90] *Mabo* v. *Queensland* (1992), 107 A.L.R. 1., (1992) 175 C.L.R. 1, [1992] 5 C.N.L.R. at A.L.R. 27.
[91] *Ibid.* at 29.
[92] See *ibid.* at 32.

7. ENTRENCHING THE TREATY OF WAITANGI AS A MEANS OF REALISING ABORIGINAL SELF-GOVERNMENT IN AOTEAROA/NEW ZEALAND

Entrenchment of the Treaty of Waitangi would provide Maori with the constitutional right to self-government in Aotearoa/New Zealand. Constitutionalisation would provide a legal basis from which aboriginal self-government could be realised and would satisfy, if not override, the requirement of statutory incorporation.

The Treaty of Waitangi has become symbolic of much, yet protective of little in Aotearoa/New Zealand. As noted by Edward Durie, "it is no longer sustainable... that the rights of indigenous people... remain tenuous in legal decision making".[1] Entrenchment would elevate both versions of the Treaty to higher law status. As noted earlier, to the extent that there are inconsistencies between the texts, the Maori version would prevail.[2]

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[1] E.T. Durie, "Waitangi: Justice and Reconciliation" (Paper presented to the School of Aboriginal and Islander Administration, University of South Australia, 10 October 1991) at 15-16.

[2] Refer to discussion in chapter six.

A) RATIONALE FOR ENTRENCHMENT

Research into explanations given at treaty signings supports the conclusion that chiefs expected the Treaty of Waitangi to initiate a new relationship in which Maori and Pakeha would share authority.[3] Under article two, the Crown promised to protect certain powers of Maori communities. Accordingly, the Treaty is a compact between Nations, a power-sharing arrangement in which there is a partnership of divided power.[4] The Maori, as noted above, were to retain governance over their internal matters and the British Crown over their own internal and external affairs.[5] The Treaty of Waitangi was the document in which these parameters of jurisdiction were expressed.

Upon signing the Treaty, both the British Crown and Maori would have been aware that an important relationship was being established. Given the use of a treaty to firmly establish this relationship, the parties must have perceived the compact to be a defining document from which subsequent developments in their country would evolve. This was the spirit and intent of the Treaty of Waitangi in 1840. Elevating the Treaty to a constitutional status would be in keeping with this intention.

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[3] C. Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Limited, 1995) at 89 [hereinafter Orange].

[4] J. Bishop, "The Treaty and the Universities" in G. Oddie & R. Perrett, eds., *Justice, Ethics & New Zealand Society* (Auckland: Oxford University Press, 1992) 109 at 112 [hereinafter Bishop].

[5] Refer to discussion in chapter six.

Arguments have been made that the Treaty of Waitangi has already become 'constitutionalised' in some sense.[6] Joseph Williams has observed that "for all of its humble beginnings and its inconsistencies, the Treaty of Waitangi is now firmly embedded in [the Aotearoa/New Zealand] legal and constitutional framework".[7] Nevertheless, the formal status of the Treaty in this framework is yet to be resolved. As emphasised by Richardson J in *New Zealand Maori Council* v. *Attorney-General [1987]:*

> any reading of our history brings home how different the attitudes of the treaty partners to the treaty have been for much of our post 1840 history: on the one hand, relative neglect and ignoring of the treaty because it was not viewed as of any constitutional significance or political or social relevance; and on the other, continuing reliance on treaty promises and continuing expressions of great loyalty to and trust in the crown. It is only in relatively recent years and as reflected in the Treaty of Waitangi legislation itself that the lagging partner has started seriously addressing these questions... Much still remains in order to develop a full understanding of the constitutional, political and social significance of the treaty in contemporary terms and our responsibilities as New Zealanders under it.[8]

The simple fact is that "New Zealand has never really had an open debate on constitutional arrangements".[9] It was not until 1986 that ordinary legislation was passed enacting the *Constitution Act*.[10] This most fundamental of all statutes failed to mention the Treaty of Waitangi. It addressed relatively basic administrative issues. The legal status of the Treaty has remained obscure.

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[6] See D.V. Williams, "The constitutional status of the Treaty of Waitangi: an historical perspective" (1990) 14 N.Z.U.L.R. 9.

[7] J. Williams, "Chapman is Wrong" [1991] N.Z.L.J. 373 at 375.

[8] *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R. 641 at 672.

[9] A. Heal, "Uncivil Disobedience: The Rebirth of Maori Radicalism" *Metro* (Auckland: August 1995) 56 at 66. Quoting Maori Congress chairman, Mason Durie [hereinafter Heal].

[10] *Constitution Act, 1986*, No. 114, Vol. 2 at 984: Long Title:

> An Act to reform the constitutional law of New Zealand, to bring together into one enactment certain provisions of constitutional significance, and to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand.

Recently, the President of the Aotearoa/New Zealand Court of Appeal seems to have recognised the elevated legal status of the Treaty of Waitangi. In *Attorney General* v. *New Zealand Maori Council [1991]*, Cooke P upheld a High Court decision to grant an interim declaration preventing the sale of FM frequencies on an administrative law ground.[11] In his reasons he also referred to a "more fundamental basis" for the decision,[12] noting that the *Radiocommunications Act* included no references to the Treaty. Given that the Treaty has not been statutorily incorporated, it has been suggested that President Cooke may have been conferring on the Treaty of Waitangi the status of a Maori *magna carta.*[13] Unfortunately, in *Te Runanga o Wharekauri Re Kohu Incorporated* v. *A.G. & Ors*, President Cooke recanted somewhat by stating that his earlier comments "can be no more than obiter, for the subject of the foundations of the New Zealand constitutional system remains unargued...".[14]

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[11] *Attorney General* v. *New Zealand Maori Council*, [1991] 2 N.Z.L.R. 129.

[12] *Ibid.* at 135.

[13] See Opinion Prepared for the Parliamentary Commissioner for the Environment, "The Crown's Obligations To Consult In Negotiations With Maori Under The Treaty Of Waitangi" in Office of the Parliamentary Commissioner for the Environment, *Environment Information And The Adequacy of Treaty Settlement Procedures* (Wellington: Parliamentary Commissioner for the Environment, September 1994) appendix one at 27: "Cooke P has made statements which attempt to establish the Treaty as a fundamental constitutional document which, like the Magna Carta, is judicially enforceable regardless of express statutory incorporation".

[14] *Te Runanga o Wharekauri Re Kohu Incorporated* v. *AG & Ors*, [1993] 2 N.Z.L.R. 301.

The precise status of the Treaty of Waitangi within the Aotearoa/New Zealand constitutional framework has yet to be authoritatively determined. Entrenchment would address this issue, whilst effectuating the recommendations of the Nuuk *Meeting of Experts regarding Indigenous Autonomy and Self-Government.* Though not necessarily urging constitutionalisation of treaties, they recommended that:

> it is necessary for the treaties, conventions and other constructive arrangements entered into in various historical circumstances to be honoured, in so far as such instruments establish and confirm the institutional and territorial basis for guaranteeing the right of indigenous peoples to autonomy and self-government.[18]

Entrenching the Treaty of Waitangi would provide as sound a basis as is possible for honouring the historic compact between the British Crown and Maori.

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[18] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, E/CN.4/1992/42, Nuuk, Greenland, September 24-28 1991.

B) Manner Of Entrenchment

Constitutionalisation as a means of honouring the spirit and intent of the Treaty of Waitangi would no doubt raise as many questions as it answers. The protection of aboriginal and treaty rights under the Canadian *Constitution Act, 1982*[16] illustrates that constitutionalisation does not necessarily eliminate even the most fundamental questions about what precisely is being entrenched. Following its enactment, a series of conferences were held in the 1980s regarding aboriginal peoples and constitutional reform.[17] The negotiations failed to reach agreement on the subject of aboriginal self-government. Many factors have been identified as contributing to the failure of these negotiations, including the wording of entrenchment provisions.[18] The precise details of entrenchment provisions, both what is said and what is implied, appears of vital significance when recommending constitutionalisation.

There are a number of ways in which the Treaty of Waitangi could assume higher law status in Aotearoa/New Zealand.[19] It could become a constitutional document in its own right.[20] The Treaty is an appropriate candidate for this form of constitutionalisation because it contains the kind of fundamental provisions which are found in the Constitutions of other states.[21] Alternatively, the Treaty could become part of an entrenched bill of rights or even a broader written constitution.

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[16] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act*].

[17] Institute of Intergovernmental Relations, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Phase Three: Final Paper) by D.C. Hawkes (Kingston, Ontario: Queen's University, 1989) at xi.

[18] See *ibid.*

[19] See F.M. Brookfield, "Kelsen, the Constitution and the Treaty" [1992] 15 N.Z.U.L.R. 163 at 175.

[20] This could involve simply elevating the two language texts that are currently appended to the *Treaty of Waitangi Act, 1975*, No. 114, Vol. 2 at 825.

When the Aotearoa/New Zealand Labour Party won the 1984 election, its manifesto included a bill of rights proposal, complete with reference to the Treaty. The proposed draft was developed almost exclusively by Pakeha officials and advisors, with some input from the Department of Maori Affairs.[22] Throughout this exercise, the Treaty was seen as something to be 'fitted into the broader bill'.[23] As drafting progressed, eight options regarding the Treaty of Waitangi emerged.[24] Following consideration of the implications pertaining to these options, a final version was drafted which provided in Article Four that:

> 1. The rights of the Maori people under the Treaty of Waitangi are hereby recognised and affirmed:
> 2. The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its true spirit and intent:
> 3. The Treaty of Waitangi means the treaty as set out in English and Maori in the schedule to this Bill of Rights.[25]

Maori critics raised four essential objections to the inclusion of the Treaty within this *Bill of Rights*. First, the Treaty of Waitangi itself was the bill of rights for

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[21] See *Constitution Act, supra* note 16.

[22] J. Kelsey, *A Question of Honour?: Labour and The Treaty 1984-1989* (Wellington: Allen & Unwin, 1990) at 51 [hereinafter Kelsey].

[23] *Ibid.*

[24] Refer Appendix Five.

Aotearoa/New Zealand and did not need to be incorporated into any new document.[26] Second, if the bill only acquired the status of ordinary legislation: "in an electoral system of Pakeha majority rule where the bill could be amended by referendum or 75 percent parliamentary vote there was a danger of the treaty being rewritten".[27] Third, the Treaty would be interpreted in Pakeha courts, who had historically failed to uphold its guarantees.[28] Finally, the Treaty would be subjected to those limits which could be "justified in a free and democratic society".[29] In light of such concerns, references to the Treaty were removed from that *Bill of Rights Act* which was in fact passed into ordinary Aotearoa/New Zealand legislation during 1990.

These objections retain currency. Entrenching the Treaty of Waitangi itself appears preferable to including it within a broader constitutional document. This manner of entrenchment diminishes concerns that Treaty rights would become limited by other provisions in a broader document. Constitutional, as opposed to ordinary legislative, status would also remove fears that rights could face amendment by majority parliamentary vote.

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[25] *A Bill of Rights for New Zealand - A White Paper* (Wellington: Government Printer, 1985).
[26] Kelsey, *supra* note 22 at 54.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*

Entrenching the Treaty in its own regard would elevate two conflicting language texts to supreme law status in Aotearoa/New Zealand. Given the differences in these versions, it would be necessary to include constitutional provisions which set out which provisions prevail.[30] Carefully worded instructions to this effect would clarify the constitutional right of Maori to self-governance. Elevating the Treaty without such clarification would inevitably lead to the uncertainties that have pervaded the meaning of this agreement throughout post-1840 history in Aotearoa/New Zealand. The absence of specifics in section 35 of the *Constitution Act, 1982* has plagued indigenous claims to self-government.

Having constitutionalised the right to aboriginal self-government, it will also be necessary to enact specific legislation implementing the right. Without ordinary statutory arrangements providing for implementation, the nature and scope of self-governance would remain ambiguous.[31]

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[30] Or some alternative interpretative provisions which are agreed to by both the Aotearoa/New Zealand government and Maori communities.

[31] Refer to discussion in chapter three regarding the value of expressing self-government in a legislative form.

C) Implications Of Entrenchment For Aboriginal Self-Government In Aotearoa/New Zealand

The fact that entrenchment of the Treaty of Waitangi would cause particular rights to accrue to certain people by virtue of their aboriginality, may not be readily accepted by many in Aotearoa/New Zealand society. Evidence that this may be expected is seen in a controversial article by G. Chapman. In discussing the Treaty of Waitangi, he asserts that:

> The very concept of that modest little document, more than 150 years after its date, according "rights", that is, special rights, to some, on the footing that "some" are in a never-ending, exclusive and cosy, relationship with the Government ("the Crown"), to which all others are not admitted, must be unacceptable, quite apart from being utterly unworkable. For that is the road to one set of rules, perquisites and advantages for one group, and another set of rules for the rest. A modern pluralist, multi-racial and multi-cultural democracy will, quite simply, come apart at the seams if such were to be its prescription.[32]

This view reflects a fundamental ignorance of the history, meaning and significance of the Treaty. It is sinister to reject the special status for Maori people emanating from the Treaty of Waitangi, whilst at the same time retaining for the remainder of the population the enduring benefits of this compact. Moreover, Chapman's views on the practicality of special status and the political consequences of this status are misplaced. The experience of indigenous peoples elsewhere, especially in the United States, demonstrates that special status is indeed workable. Rather than ripping Aotearoa/New Zealand society "apart at the seams", recognition of the special status of Maori will hold the state together.[33]

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[32]. G. Chapman, "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-making" [1991] N.Z.L.J. 228 at 229. In Canada, there has also been concerned raised regarding the special status of individuals on the basis of ethnicity: see the comments of Muldoon J in *Canada (Canadian Human Rights Commission)* v. *Canada (Department of Indian Affairs and Northern Development) (re Prince)*, [1994] F.C.F. No. 1998, [1995] 3 C.N.L.R. 28.

The Treaty of Waitangi represents a political compact between political groups. Like any other political compact, it should be honoured. When Aotearoa/New Zealand enters into a compact with Australia regarding security and defence, the over-riding intention is that the compact will be kept. If Australia requires assistance in these areas, the Aotearoa/New Zealand government is politically compelled to act. If the compact requires alteration, changes are negotiable. The same compulsion exists for the Crown to honour the compact made with political Maori communities in 1840, or to negotiate change.[34]

In recent years Maori insistence that the Treaty be honoured have become more ardent. As these claims continue to be ignored and/or marginalised, Maori-Pakeha relations in Aotearoa/New Zealand appear to be deteriorating. The seams are beginning to split precisely because official public policy is very close to the views advocated by Mr.

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[33] See M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen Publications, 1984) at chapter six.

[34] Note comments of the Waitangi Tribunal in Waitangi Tribunal, *Motuni-Waitara Report* (Wellington: Department of Justice, 1983) that it was not:

> inconsistent with the spirit and intention of the Treaty that the Crown and Maori people affected should agree to alter the incidence of the strict terms of the Treaty in order to seek acceptable, practical solutions.

Chapman. This societal deterioration is likely to continue until certain attitudes are recognised as founded in ignorance. The realisation of rights such as the right to self-government is simply the fulfillment of what was promised to Maori communities in the past - the execution of treaty assurances given over one hundred and fifty years ago.

For much of Aotearoa/New Zealand's post-1840 history, justice has been denied to the indigenous population. Entrenchment of the Treaty of Waitangi would be a substantial step towards rectifying this situation. For all the controversy this recommendation may engender, the simple truth is that certain rights were guaranteed to certain people upon Pakeha settlement in this country.[35] Self-government is perhaps the most central of these rights.

Mainstream society needs to understand that the entrenchment of the Treaty of Waitangi is in its interest. As Jane Kelsey has argued:

> The response of the state will be no different from any other time since 1840 unless it can be forced to address the central issue of economic and political power. In large part the success of such resistence will depend on whether Pakeha can be convinced that the successful reassertion of te tino rangatiratanga o te iwi Maori over Aotearoa is in their interests, too.[36]

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[35] Given the submission that enforceability of self-government in the domestic courts would reflect the intention of the Treaty at the time of signing, it is interesting to note the *Reference Re An Act To Amend The Education Act (Ontario)*, [1988] 40 D.L.R. (4th) 18, 5 A.C.W.S. (3d) 10 decision. The Canadian Supreme Court dismissed an appeal involving Bill 30; an Amendment Act to implement full funding for Roman Catholic separate high schools in Ontario. In the context of analysis of implications of the Charter of Rights and Freedoms, emphasis was placed on the fact that: "The country was founded upon the recognition of special or unequal rights for specific religious groups in Ontario and Quebec".
Analogies can certainly be drawn to the Aotearoa/New Zealand situation, where Maori-Pakeha relations were founded on the guarantees of certain rights to the indigenous population.

[36] Kelsey, *supra* note 22 at 270.

There are a number of potential benefits which would result from the recognition of the Maori right to self-government. The current cost of the Crown in maintaining governing control over Maori communities may well be greater than it would be under a system of Maori self-government. Incentives for communities to be financially accountable can never be fully developed when people are treated as "wards in a colonial administration instead of constitutional equals".[37] The realisation of self-government would also remove much of the bureaucracy involved with administering Maori programmes, thereby enabling more funding to reach indigenous communities instead of being used in basic administration.

Entrenching the treaty right to self-government would enable Maori to focus attention on improving the quality of life for their communities, instead of focusing their energies on lobbying Wellington for recognition of *tino rangatiratanga*. The Aotearoa/New Zealand government could likewise direct its energies towards other political issues than Maori autonomy grievances. Achieving understanding on the governance issue may even provide a basis for settlements involving land and resources.

Reaching this level of understanding will not be simple. Issues of authority and jurisdiction must be addressed. Crucial questions will need to be answered: who is

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[37] F. Cassidy & R.L. Bish, *Indian Government. Its Meaning in Practice* (co-published: Lantzville, B.C.; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 171.

Maori? what type of jurisdiction will Maori governments assume? what will be the relationship between governing authorities of Maori and the governing authority of the larger state? how will self-government be financed? what are the implications for citizenship? how will non-aboriginal interests be provided for? Addressing these issues will involve much negotiation between Maori communities and the Aotearoa/New Zealand government.

1. ADDRESSING THE COMPLEXITIES

1.1 CONTEMPORARY RECOGNITION

Treaty rights established during 1840 were guaranteed to signatory chiefs who represented *iwi* (and sometimes *hapu*) communities. Not all Maori communities were provided with the opportunity to sign the Treaty of Waitangi and guarantee their right to *te tino rangatiratanga*.[38] Other chiefs refused to sign, wary of the true colonial intent to assume total control over their peoples' lives.[39]

These communities arguably retain self-governance as an aboriginal, if not treaty, right post-1840. Recognition of the right to self-government for non-signatory communities should compliment realisation based on constitutional treaty guarantees.

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[38] For example, in late 1840 Hobson proclaimed sovereignty over the South Island on the basis that it was *terra nullius*, thereby ignoring the existence of Ngai Tahu: see R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990) at 97.

[39] See Orange, *supra* note 2 at chapter four.

Since 1840, the Treaty of Waitangi has become central to **all** Maori claims in Aotearoa/New Zealand. This compact has come to represent **the** basis for indigenous grievances. The manner of entrenchment should make explicit that the Treaty applies to all Maori whether signatories or not. To attempt to draw distinctions between communal groups in modern times would be impracticable, and both socially and politically unacceptable.

Canadian jurisprudence establishes the aboriginal right to self-government as attaching to land. Realisation of Maori self-governance in Aotearoa/New Zealand should also be tied to a land-base, but currently this is problematic. When Maori entered treaty during 1840, their understanding of governing jurisdiction would have been for *te tino rangatiratanga* to be retained over land. Contemporary recognition of this 'spirit and intent' is complicated by the fact that almost no land is now tribally held. Maori land comprises only five percent of the national aggregate.[40] In some tribal areas there is little, or no, Maori land.[41] These realities will greatly affect how that self-governance guaranteed in 1840 becomes realised in the 1990s.

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[40] E.T.J. Durie, "The Process of Settling Indigenous Claims" (Paper presented to the International Symposium on Indigenous Peoples: Rights, Lands, Resources, Autonomy: Vancouver, 20 March 1996) at 3.

[41] *Ibid.*

Resolution of Maori land claims will be integral to the realisation of aboriginal self-government in Aotearoa/New Zealand. Self-governing jurisdiction could become negotiated as part of land claims processes. Attempting to implement self-government without a land-base is considerably more complex and controversial than land-based jurisdiction.[42] Nonetheless, some form of extra-territorial jurisdiction may need to be negotiated. Eighty percent of people identifying as Maori now live outside their tribal areas.[43] While the right to self-government may be held tribally over land, the political nature of the Waitangi compact may allow some variability in the scope and nature of those self-governing able to be negotiated.[44]

1.2 SUCCESSFUL NEGOTIATIONS

Resolving issues such as the nature and scope of aboriginal self-governing jurisdiction in Aotearoa/New Zealand will require extensive inter-governmental negotiation. Recognising and understanding cultural differences between parties will be integral to successful cross-cultural negotiations.[45] For if "there is to be justice between two protagonists, it is essential that both parties share the same conception of what justice should be. It is paramount that a number of terms, values and norms be held in common".[46] Minimally each side must understand and accord respect to the fundamental values of the other party.

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[42] Refer to discussion in chapter four.

[43] New Zealand Department of Statistics, *Population and Dwellings: 1991 Census of Populations and Dwellings* (Wellington: New Zealand Department of Statistics, 1991). According to these statistics, some twenty seven percent of Maori acknowledge no tribal affiliation. This is a problem that Maori communities will need to address in order for these people to come under indigenous governing jurisdiction.

[44] Unfortunately fuller discussion of this issue is outside the scope of this thesis.

[45] See A.G. McCallum, *Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments* (Faculty of Law, York University, 1993) [unpublished] at 119.

Reaching agreement on what justice involves has previously been complicated in Aotearoa/New Zealand by debate about who the actual protagonists should be. As noted by Maori Congress chairman Mason Durie:

> The question today is when is the tribal voice the most relevant expression of tino rangatiratanga and when are others? It depends on the issues. When it's natural and physical resources and perhaps fisheries, then a tribal voice at hapu or iwi level is difficult to bypass. When broader issues are at stake, education, employment, and so on, the tribal voice is less relevant than the voice of Maori generally. The question is: when is one more appropriate than the other.[47]

Much debate surrounds the appropriateness of a generic body negotiating on behalf of Maori. According to Caren Wickliffe, "until we get tribal structures right, what right do pan-Maori groups have to speak on behalf of Maori, and what is the degree of their authority?"[48] In agreement Ngai Tahu Trust Board chairman, Sir Tipene O'Regan has described *iwi* as the most effective means of representation because Maori have never been, and never will be, a unity.[49]

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[46] J. Tremblay & P. Forest, *Aboriginal People and Self-Determination: A Few Aspects of Government Policy in Four Selected Countries* (Quebec: Government of Quebec, Studies and Research Collection, 1993) at 43 [hereinafter Tremblay & Forest].
[47] Heal, *supra* note 9 at 61.
[48] *Ibid.* at 62.
[49] *Ibid.*

The appropriateness of a pan-Maori negotiating body is particularly relevant in the context of self-government negotiations. The legal status of the treaty right to self-government in Aotearoa/New Zealand exists at a tribal level. However the Treaty is a political compact. As such, the **political status** of this right could be negotiated differently to address the reality of tribal situations.[50]

Although further discussion of this, and other, issues is outside the scope of this thesis, it is obvious that any realisation of aboriginal self-government will not be uncomplicated. Much will be advocated and debated before settlement is likely to occur. There will be serious obstacles, but if there is goodwill and a genuine attempt to understand each others' perspectives, they will not be insurmountable. From a positive perspective, it has been argued in recent years that the "Treaty has emerged as a central unifying force, providing a cultural frame of reference for renewal of Maori-state relations, along lines of partnership and power-sharing".[51] If this framework is properly understood and accepted, there is no reason why the realisation of Maori self-governance in Aotearoa/New Zealand cannot occur.

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[50] Refer to earlier comments in this chapter regarding current tribal status in Aotearoa/New Zealand.

[51] A. Fleras & J.L. Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand* (Ontario: Oxford University Press, 1992) at 218.

2. SHIFTING POWER

As Maori communities resume governing control over their members, power structures that have long determined relationships between these communities and general governments will face significant alteration.[52] Jane Kelsey has maintained that increased Maori political autonomy:

> will require a process of political, legal and economic reform which recognises the independent sovereignty of the tangata whenua - not through a dependent or interdependent nationhood subordinate to the Pakeha state but as co-existing constitutional entities.[53]

Achieving these reforms will require much change in Aotearoa/New Zealand.

It is indeniable that after one hundred and fifty years of presumed and de facto authority over Maori, the realisation of aboriginal self-government will necessitate an unprecedented departure from state accepted views of control. The manner in which realisation will affect such control is open to speculation:

> While it may be undeniable that the Treaty places limits on the Crown's power of government over New Zealand, it is notoriously difficult to arrive at a stable view of what these limits are and what administrative and legal mechanisms would be required to ensure Crown observance of them.[54]

For this reason, it is critical that administrative and legal certainty is achieved through a negotiated process.

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[52] See Tremblay & Forest, *supra* note 46: General hypothesis:

> A consequence of growing aboriginal self-determination is an alteration in the power structures that long governed relationships between various industrial countries and the aboriginal peoples living within them.

[53] *Ibid.* at 41.

It has been suggested that in reconciling the intention of parties in signing the Treaty of Waitangi:

> [t]he protection of tino rangatiratanga would appear to entail that Maori should retain a sphere of complete control over all, or at least some significant portion, of their own affairs. If so, then, under the system ideally envisaged in the treaty, direct Crown government would seem to apply only to Pakeha, to certain interactions between Pakeha and Maori, and, perhaps, to certain inter-tribal Maori relations... According to this view, the Treaty sets up a partnership between the Maori tribes and the Crown only in a minimalist sense: the Crown has to act jointly with the Maori tribes in setting up a mutually acceptable overarching framework within which tino rangatiratanga may hold unhindered sway over its own appropriate sphere: once that sphere is defined, what happens within it is entirely Maori business, and, correspondingly, what happens outside that sphere is entirely Crown business.[55]

Many argue that currently there is no practical possibility of implementing this governance 'partnership' model.[56] With increased urbanisation and changes in the nature of tribal communities, there will be difficulty in realising the actual intent of the Treaty after years of assimilative policies. But as much as is possible should be done. And what can be done is considerable.[57] If "the Crown cannot now (even if largely through its own fault) keep the letter of the Treaty, then it should try to keep as far as possible to its spirit".[58]

Partnership is fundamental to the spirit of the Treaty. Where communities have become unequal in significant respects, partnership works best if it gives groups separate

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[54] Bishop, *supra* note 4 at 112-113.

[55] *Ibid.*

[56] See *ibid.* at 113.

[57] Note discussion in chapter two regarding the scope of self-governing powers recognised by the Canadian federal government as negotiable. This policy guide may provide a useful framework for similar aspects of governing jurisdiction to be negotiated in Aotearoa/New Zealand.

spheres of control over their own affairs.[59] Self-government, virtually by definition, would achieve just this. Realisation of Maori self-governance can happen in Aotearoa/New Zealand. The honouring of those promises made over one hundred and fifty years ago will enable Maori to resume government by self, over self.

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[58] Bishop, *supra* note 4 at 113.
[59] *Ibid.* at 115.

8. CONCLUSION

The realisation of aboriginal self-government in Aotearoa/New Zealand will ultimately require a legal reformation,[1] a remaking of the constitutional framework through which the law structures and makes sense of Maori reality. Indigenous rights cannot be properly accommodated within current legal understanding in Aotearoa/New Zealand.[2] The law must create space for rights such as aboriginal self-government to take root and flourish.[3]

The statutory incorporation rule may well frustrate claims to indigenous self-governance as a treaty right in Aotearoa/New Zealand. Constitutional entrenchment of the Treaty of Waitangi would effectively deal with this problem. In the event that the Treaty is neither constitutionalised or recognised by legislation, the statutory incorporation rule could be circumvented by the theory that Maori self-government is an aboriginal right at common law. A strong legal basis exists for such a claim.

In Canada it has been noted that poverty and powerlessness have been the Canadian legacy to indigenous communities who once governed themselves in full selfsufficiency.[4] The same could be said for colonial actions in Aotearoa/New Zealand. The realisation of Maori self-government will cause unprecedented change in the nature and structures of governance within Aotearoa/New Zealand. It will challenge much of what is, and shape what will be. It will reflect the spirit and intent of a treaty signed more than 150 years ago for Aotearoa/New Zealand to become **one** country with **two** governing Nations.

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[1] P. Macklem, "First Nations Self-Government and the Borders of the Canadian Imagination" (1991) 36 McGill Law Journal 382 at 395 [hereinafter Macklem].

[2] Under current law, the Treaty must be statutorily incorporated before the rights it guarantees become legally enforceable: refer to discussion in chapters three and six.

[3] Macklem, *supra* note 1 at 395.

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[4] A. Fleras & J.L. Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992) at 121.

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APPENDIX ONE

SELF-GOVERNING LEGISLATION IN CANADA VIA ORDINARY STATUTES

a) INDIAN ACT

Ever since the first consolidated *Indian Act* was passed in 1876, this Act has imposed comprehensive control over activities in all sectors of aboriginal communities. In the 1983 Penner Report,[1] the Department of Indian Affairs and Northern Development stated that the main purposes of this Act were "to provide for band councils and the management and protection of Indian lands and moneys, to define certain Indian rights, such as exemption from taxation in certain circumstances, and to define entitlements to band membership and to Indian status".[2]

In terms of self-governance, certain provisions of the *Indian Act* contemplate that First Nations may exercise a measure of local control. For example, section 81 of the Act outlines numerous, and in some cases important, areas in which band councils can make by-laws. These by-laws are subject, however, to Ministerial disallowance.[3] This seemingly unfettered ministerial discretion has fuelled criticism that the *Indian Act* does little to facilitate actual or meaningful self-government, but only provides for some degree of self-administration or self-management.[4]

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[1] This report was the result of hearings held across Canada by a Special Committee established by the House of Commons in 1982 to look at the issue of self-government: See Canadian House of Commons, *Minutes of Proceedings of the Special Committee on Indian Self-Government Respecting the Status, Development and Responsibilities of Band Governments on Indian Reserves, as well as the Financial Relationships Between the Government of Canada and Indian Bands including the Second Report to the House* (Ottawa: Department of Supplies and Services, 1983) [hereinafter Penner].

[2] Institute of Intergovernmental Relations, *Aboriginal Self-Government Arrangements in Canada* (Background Paper Number 15) by E.J. Peters (Kingston, Ontario: Queen's University, 1987) at 5 [hereinafter Peters].

Despite the inherent limitations of governance provisions contained in the *Indian Act*, numerous bands have extended their responsibilities under this statute into areas such as education, health care, social services, and economic development.[5] While the Act may merely provide for delegated statutory management, many bands are exercising these powers to their fullest extent, and re-gaining some limited degree of control over their communities.

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[3] *Ibid.* at 6.

[4] See *ibid.* at 5. See also Penner, *supra* note 1:

> The Committee does not support amending the *Indian Act* as a route to self-government. The antiquated policy basis and structure of the *Indian Act* make it completely unacceptable as a blueprint for the future.

[5] See D.W. Elliott, ed., *Law and Aboriginal Peoples of Canada*, 2d ed. (North York, Ontario: Captus Press Inc., 1994) at 194 [hereinafter Elliott].

6) ACT CONCERNING NORTHERN VILLAGES AND THE KATIVIK REGIONAL GOVERNMENT

Applying to Quebec territory situated north of the fifty-fifth parallel, this Act was assented to in 1973. The extent to which the *Act Concerning Northern Villages and the Kativik Regional Government* realises "meaningful" aboriginal self-government is also debatable. Institutions created by the Act are not the customary institutions of the aboriginal peoples affected. Instead the Act establishes local and regional governments representing municipalities in which both aboriginal and non-aboriginal residents may vote, be elected and otherwise participate.[6]

These municipalities are empowered by the Act to make by-laws providing for keeping the peace, maintaining law and order, health, government, general welfare and improvements within the municipality.[7] Similar to the *Indian Act*, any by-law passed by the municipality is subject to disallowance by the Minister of Municipal Affairs.[8] thus, the *Act Concerning Northern Villages and the Kativik Regional Government* may also be criticised for not facilitating meaningful self-government, but merely providing for degrees of self-administration.

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[6] See Peters, *supra* note 2 at 14-15.
[7] See *ibid.* at 15.
[8] See *ibid.* at 17.

c) SECHELT INDIAN BAND SELF-GOVERNMENT ACT

In 1986, the *Sechelt Indian Band Self-Government Act* enabled the Sechelt community to assume legal and political control over their reserve in British Columbia.[9] The form of self-government advanced under this Act involves an exercise based on "legislatively delegated powers, a partial elimination of the role of the *Indian Act*, and the further evolution of Indian governments as municipal-style governments within the current federal-provincial systems".[10]

The Band possesses delegated authority to negotiate agreements concerning a variety of governing functions with the federal and provincial governments.[11] The actual specifics of Sechelt's government are contained in their band constitution.[12] This written document must be accepted by a majority of electors, and then approved by the Governor in Council.[13] *Indian Act* provisions will continue to prevail unless they are inconsistent with the Act, the Band's Constitution, or until declared inapplicable by the Governor in Council.

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[9] O.P. Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart Inc., 1992) at 416 [hereinafter Dickason].

[10] F. Cassidy & R.L. Bish, *Indian Government: Its Meaning In Practice* (co-published: Lantzville, BC; Halifax, Nova Scotia: Oolichan Books; The Institute for Research on Public Policy, 1989) at 136 [hereinafter Cassidy & Bish].

[11] *Ibid.*

[12] See The Canadian Bar Association Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: The Canadian Bar Association, August 1988) at 36 [hereinafter Canadian Bar Assn].

[13] See Cassidy & Bish, *supra* note 10 at 36.

Section 37 of the *Sechelt Indian Band Self-Government Act* provides for the application of all 'Federal and Provincial Laws of General Application' to the Band. Although the Act has enabled Sechelt to assume control over their land, resources, health, social services, education, and local taxation[14], it is also important to note:

> that it is not the model to which many Indian governments have been aspiring when they have referred to real Indian government, to true Indian government. Indian governments want and need Sechelt style governing powers, but they want much more.[15]

Ever since enactment, the *Sechelt Indian Band Self-Government Act* has faced considerable criticism. It has been argued that the:

> Sechelt initiative may well be part of an effort by the federal and provincial governments to reframe the issue of Indian governments into the current federal-provincial systems as governments with enhanced municipal-style powers, rather than as governments with inherent powers operating in a special and somewhat equal relationship to the federal and provincial governments.[16]

While the *Sechelt Indian Band Self-Government Act* does provide legislative realisation of one form of self-government, it does not appear to be the form of "meaningful" governance that many aboriginal communities are aspiring to.

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[14] See T. Isaac, "The Storm Over Aboriginal Self-Government: Section 35 Of The *Constitution Act, 1982* And The Redefinition Of The Inherent Right Of Aboriginal Self-Government" [1992] 2 C.N.L.R. at 17 [hereinafter Isaac].

[15] Cassidy & Bish, *supra* note 10 at 143-144.

[16] *Ibid.* at 141.

a) CREE NASKAPI (OF QUEBEC) ACT

The *Cree Naskapi (of Quebec) Act* was enacted pursuant to provisions in two major land claim agreements; the *James Bay and Northern Quebec Agreement* and the *Northeastern Quebec Agreement.*[17] These Agreements obligated federal signatories to recommend that Parliament pass certain legislation regarding local government and land administration for the Cree of the James Bay Territory. As a result the *Cree/Naskapi (of Quebec) Act* was passed in June 1984.

Having originated in these Agreements, the nature and scope of the Act was pre-determined in most respects.[18] Under its terms the legal personality of Cree and Naskapi bands, who are signatories of the *James Bay and Northern Quebec* and *Northeastern Quebec Agreements*, is corporate in nature. The Act also sets out the Band's government structures and powers, internal political accountability mechanisms, and procedures for dealing with land and resources as outlined in the Agreements.[19]

With the exception of provisions respecting "status", the *Cree/Naskapi (of Quebec) Act* supercedes the *Indian Act.* Its legal priority is second only to that of the

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[17] Isaac, *supra* note 14 at 16.

[18] See Peters, *supra* note 2 at 11.

[19] See Canadian Bar Assn, *supra* note 12 at 35. This piece of legislation has, however, been criticised by the Grand Council of the Cree for failing to cover the major portion of Cree traditional territory: See S. Venne, *Government Structures and Powers: Documentation and Analysis: NWT Treaty 8 Tribal Council* (LL.M Student, Faculty of Law, University of Alberta, December 30, 1995) [unpublished] at 18.

James Bay and Northern Quebec Native Claims Settlement Act, the federal statute incorporating the Agreements from which it emerged.[20]

Each of the nine Cree and Naskapi bands affected were incorporated, with band corporations receiving by-law-making powers similar to those possessed by a local government under provincial legislation.[21] Band corporations are required to forward copies of all by-laws enacted to the Minister of Indian Affairs and Northern Development. However, approval of these by-laws is not subject to ministerial discretion unless they deal with elections, hunting, fishing or trapping.[22]

The argument has been made that the *Cree/Naskapi (of Quebec) Act* is a stronger instrument of self-government than the *Sechelt Indian Band Self-Government Act*. This assertion can be justified on at least one basis. Unlike Sechelt, the Cree-Naskapi legislation evolved from comprehensive land claims agreements, which enjoy constitutional protection under section 35 of the *Constitution Act, 1982*. It has been noted:

> It is true that the... Act... is a statute of Parliament. Nonetheless, the Crees argue that under section 35 of the Constitution Act 1982, they now have a constitutional right to self-government... Consequently... Parliament cannot unilaterally amend the Act... in a manner unacceptable to the Crees without violating a constitutional obligation.[23]

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[20] Dickason, *supra* note 9 at 413.
[21] Peters, *supra* note 2 at 12.
[22] *Ibid.* at 13.
[23] Cassidy & Bish, *supra* note 10 at 147-148.

In this regard. it can be argued that some form of relatively meaningful aboriginal self-government receives legal status pursuant to both ordinary legislation through the *Cree/Naskapi (of Quebec)Act.* and constitutional entrenchment of the Agreements from which this Act emerged.

c) NUNAVUT ACT

In May of 1993, comprehensive land claim negotiations between the Inuit of the Nunavut and the Canadian Government culminated in the signing of a Final Agreement.[24] Shortly thereafter, federal legislation was enacted giving effect to this Agreement, including the *Nunavut Act* which was assented to in June 1993.[25] This Act establishes that the territory of 'Nunavut' in the Eastern Artic, and its corresponding government, will come into effect in 1999. Provisions for a Legislature, with general law-making powers, seem to advocate some meaningful form of self-government.[26] The Act establishes also both a Supreme Court and Court of Appeal for the territory.

The *Nunavut Act* itself, provides ordinary legislative status for aboriginal self-government. Furthermore, having been enacted as a result of a land claim agreement, the right to self-governance also has constitutional status under section 35 of the *Constitution Act, 1982*.

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[24] Indian Affairs & Northern Development, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Ottawa: Minister of Supply and Services, 25 May 1993).

[25] See Library Of Parliament Research Branch, *Aboriginal Self-Government* (Ottawa: Library of Parliament, 1989) at 13 [hereinafter Parliament Library].

[26] For a more detailed discussion of the *Nunavut Act 1993*, see C. Wickliffe, *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* (Report prepared for New Zealand Parliamentary Commissioner for the Environment, 1994) at 111.

j) YUKON FIRST NATIONS SELF-GOVERNMENT ACT

The *Yukon First Nations Self-Government Act* was given Royal Assent on 7 July, 1994. The purpose of this Act is to enable fourteen Yukon First Nations to assume jurisdictional responsibility and authority over their communities.[27] Each First Nation has the mandate to draft its own constitution and pass certain laws regarding language, culture, health care, welfare services, and education.[28] One community to have already negotiated this assumption of responsibility is the Vuntut Gwitchin through the *Vuntut Gwitchin First Nation Government Agreement*.[29]

By providing for more extensive self-governing powers, the *Yukon First Nations Self-Government Act* seems to promote a means of self-government which lies further along the continuum. Although still within the sphere of delegated powers, a relative amount of independence from the Federal Government is provided for, and some degree of "meaningful" self-government may be possible.

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[27] See Parliament Library, *supra* note 25 at 12
[28] See *ibid.*
[29] See Elliott, *supra* note 5 at 207.

APPENDIX TWO

Reference: Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Federal Policy Guide, 1995) at 5.

... the range of matters that the federal government would see as subjects for negotiation could include all, some, or parts of the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- policing
- property rights, including succession and estates
- land management, including: zoning, service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation on respect of direct taxes of members
- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands

APPENDIX THREE

SOURCE: C. Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Limited, 1995) at 255-256.

He Wakaputanga o te Rangatiratanga o Nu Tireni (A Declaration of the Independence of New Zealand) (Maori text)

1. Ko matou, ko nga Tino Rangatira o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Oketopa 1835, ka wakaputa i te Rangatiratanga o to matou wenua a ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huaina, Ko te Wakaminenga o nga Hapu o Nu Tireni.

2. Ko te Kingitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga, a ka mea hoke e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni, ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei matou i to matou huihuinga.

3. Ko matou ko nga tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te Ngahuru i tenei tau i tenei tua ki te wakarite ture kia tika ai te wakawakanga, kia mau pu te rongo kia mutu te he kia tika te hokohoko, a ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a kia uru ratou ki te wakaminenga o Nu Tireni.

4. Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu I to matou aroha nana hoki i wakaee ki te Kara mo matou. A no te mea ka atawai matou, ka tiaki i nga pakeha e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

Kua wakaaetia katoatia e matou i tenei ra i te 28 Oketopa, 1835, ki te aroaro o te Reireneti o te Kingi o Ingarani.

[There follows the marks or signatures of the chiefs].

Note: The Declaration was first signed on 28 October 1835 by thirty-four chiefs. The last name was added on 22 July 1839, making a total of fifty-two chiefs.

A Declaration of the Independence of New Zealand (English text)

1. We, the hereditary chiefs and heads of the tribes of the Northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, on this day of October, 1835, declare the Independence of our country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand.

2. All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.

3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year, for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade; and they cordially invite the Southern tribes to lay aside their private animosities and to consult the safety and welfare of our common country, by joining the Confederation of the United Tribes.

4. They also agree to send a copy of this Declaration to His Majesty the King of England, to thank him for his acknowledgment of their flag; and in return for the friendship and protection they have shown, and are prepared to show, to such of his subjects as have settled in their country, or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence.

Agreed to unanimously on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.

[Here follows the signatures or marks of thirty-five hereditary chiefs or Heads of tribes, which form a fair representation of the tribes of New Zealand from the North Cape to the latitude of the River Thames.]

English witnesses -
(Signed) Henry Williams, Missionary, C.M.S.
George Clar, C.M.S.
James C. Clendon, Merchant.
Gilbert Mair, Merchant.

I certify that the above is a correct copy of the Declaration of the Chiefs, according to the translation of Missionaries who have resided ten years and upwards in the country; and it is transmitted to his Most Gracious Majesty the King of England, at the unanimous request of the chiefs.

(Signed) JAMES BUSBY,
British Resident at New Zealand.

APPENDIX FOUR

SOURCE: I.H. Kawharu, *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) Appendix 1.

Te Tiriti o Waitangi (The Treaty of Waitangi) (Maori text)

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hohi te Rongo ki a ratou me te Atanoho hoki kua wahaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana I te Roiara Nawi hei Kawana mo nga wahi katou o Nu Tirani e tukua aianei, amoa atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai I uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaaw ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi e pai ai te tangata nona te Wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) W. Hobson
Consul & Lieutenant Governor

Na ko matou ko nga Ranagatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei I te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi I te ono o nga ra o Pepueri I te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Translation of Maori text by I H Kawharu

Victoria, the Queen of England in her concern to protect The Chiefs and the sub-tribes of New Zealand in her desire and to preserve to them their chieftainship and their land and to maintain continually also the Peace to them and the quiet living therefore has considered she a thing right to give a Chief one who will arrange with the people ordinary of New Zealand to reach an agreement by the Chiefs ordinary [for] the government of the Queen [to be] upon the places all of this land and the Islands because also there are many other people of her tribe [who] have lived on this land, and will come here. So the queen desires to establish the government so that no evil will come to the people Maori [and] to the European living law without. So [it] has pleased the Queen to allow me William Hobson a Captain in the Royal Navy to be Governor for the places all of New Zealand to be received shortly [and] hereafter to the Queen [and so] is making she for the Chiefs of the Confederation of the sub-tribes of New Zealand and other Chiefs these laws set out here.

[This is] the first

The Chiefs of the Confederation and the Chiefs all also [who] have not entered that Confederation give absolutely to the Queen of England for ever the government all of their land.

[This is] the second

The Queen of England arranges [and] agrees to the Chiefs to the subtribes to people all of New Zealand the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all. But on the other hand the Chiefs of the Confederation and the Chiefs all will give to the Queen the sale and purchase of those parts land as willing [to sell] the person owning the land for the amount of the price agreed between them [viz. the vendor and] the purchaser appointed by the Queen as an agent purchase for her.

[This is] the third

For arrangement therefore this for the agreement concerning the Government of the Queen will be protected by the Queen of England the people ordinary all of New Zealand [who] will give them the rights and duties all in equal measure [that apply] under her constitution to the people of England.

[signed] William Hobson
Consul and Lieut. Gov

So we the Chiefs of the Confederation of the sub-tribes of New Zealand meeting here at Waitangi are therefore the Chiefs of New Zealand having seen the shape of these words being accepted and agreed all by us, thus are recorded our names and our marks.

Done this at Waitangi on the sixth of the days of February in the year one thousand, eight hundred and forty of our Lord.

The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aboriginees of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and institutions alike to the native population and to Her subjects has been graciously pleased to empower and authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be of hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess as long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(Signed) W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made to fully understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified -

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

APPENDIX FIVE

SOURCE: J. Kelsey, *A Question of Honour?: Labour and The Treaty* (Wellington: Allen & Unwin, 1990) at 52-53.

OPTIONS REGARDING INCLUSION OF THE TREATY OF WAITANGI IN AN ENTRENCHED BILL OF RIGHTS

1. Reference to the treaty in the preamble, but not providing any enforceable right;
2. An interpretation provision, with a rebuttable presumption that Parliament intended legislation not to infringe the principles of the treaty;
3. Incorporation of the treaty in the bill, making any law contrary to the treaty invalid;
4. Incorporating specific rights from the treaty (which it was felt could stifle future interpretation of Maori rights);
5. Mandatory consideration of Maori interests in future legislation;
6. Recognising specific customary rights, such as land, fishing, language and 'their own customary law in certain relations';
7. Preservation of Maori rights, leaving them undefined and subject to judicial interpretation; and
8. A new Treaty of Waitangi, negotiating a 'completely new compact between the Maori people and the Crown which would supercede the Treaty of Waitangi'.